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SPYING IN VIOLATION OF ARTICLE 106, UCMJ: THE OFFENSE AND THE CONSTITUTIONALITY OF ITS MANDATORY DEATH PENALTY

A Thesis
Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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37TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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SPYING IN VIOLATION OF ARTICLE 106, UCMJ: THE OFFENSE AND THE CONSTITUTIONALITY OF ITS MANDATORY DEATH PENALTY

by Major D. A. Anderson

ABSTRACT: This thesis examines the offense of spying in violation of Article 106, UCMJ, and the constitutionality of its mandatory death sentence. The history of Article 106, UCMJ, is reviewed, and the constitutionality of its mandatory death sentence is assessed in light of capital punishment precedents from the U.S. Supreme Court and the U.S. Court of Military Appeals and in light of current international law. The thesis concludes that the mandatory death sentence for spying is clearly unconstitutional and proposes a remedial amendment to the Uniform Code of Military Justice.

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"In my opinion the spy is the greatest of soldiers: if he is the most detested by the enemy it is only because he is the most feared."[1] ---- King George V

"One spy in the right place is worth 20,000 men in the field."[2] ---- Napoleon

I. INTRODUCTION

In today's society, would Captain Nathan Hale, American officer and revolutionary patriot, or Major John Andre, British officer and revolutionary patriot, be sentenced to hang? In 1776, at the beginning of America's Revolutionary War, Captain Hale volunteered to go behind British lines to spy on the enemy; he was captured in the disguise of a Dutch school teacher, and the following day he was hanged.[3] General Henry W. Halleck, General-in-Chief of the Union Armies from 1862 to 1864,[4] described Captain Hale's mission and fate in these terms:

> After the retreat of Washington from Long Island, Captain Nathan Hale re-crossed to that island, entered the British lines, *in disguise*, and obtained the best possible intelligence of the enemy's forces, and their intended operations; but, in his attempt to return, he was apprehended, and brought before Sir William Howe, who gave immediate orders for his execution *as a spy*; and these orders were carried into execution the very next morning, under circumstances of unnecessary rigor, the prisoner not being allowed to see a clergyman, nor even the use of a bible, although he respectfully asked for both.[5]

During that same war four years later, Major John Andre was captured behind American lines in civilian

clothes and hanged as a spy.[6] His story has been summarized as follows:

> John Andre...joined the British army in Canada and became aide-de-camp to Gen. Sir Henry Clinton. [General] Benedict Arnold, an American commandant, [undertook] to surrender a certain fortress, [West Point], to the British forces[.] Andre was sent by Clinton to make the necessary arrangements for carrying out this engagement. Andre met Arnold near the Hudson on the night of September 20, 1780; then Andre put on civilian clothes, and by means of a passport given to him by Arnold in the name of John Anderson he was to pass through the American lines. Approaching the British lines, he was captured and handed over to the American military authorities. A [Board of General Officers] summoned by [General George] Washington convicted him of [spying] and declared that 'agreeably to the laws and usages of nations he ought to suffer death.' He was hanged October 2, 1780; but in [England] he was considered a martyr....[7]

According to tradition, just prior to his death, Captain Hale declared, "I only regret that I have but one life to lose for my country."[8] In a similar vein, when Major Andre was on the gallows, he observed, "I die for the honour of my king and country."[9] Despite the fact that both Captain Hale and Major Andre were considered fearless officers, fine gentlemen, and noble patriots,[10] they both suffered the standard punishment prescribed by law at the time for the offense of spying, death.[11] Confinement and a later exchange of captured spies was not an option; the common law would not permit it.[12] Once confirmed as a spy, a man's death warrant was virtually sealed.[13]

From the Revolutionary War to the present, Americans have had little tolerance for spies.[14] During World War II, for instance, eighteen German soldiers were captured during the Battle of the Bulge attempting to disrupt American operations while wearing American uniforms behind enemy lines; all were tried before military commissions, convicted of spying, sentenced to death, and executed.[15] Currently, Article 106 of the Uniform Code of Military Justice (UCMJ) mandates that anyone convicted of spying shall suffer death.[16] The offense of spying is unique among the punitive articles in the UCMJ: it is the only offense for which death is the mandatory punishment.[17]

Over time, civilization in America has progressed and traditions have changed, but the punishment for spying has remained the same. This paper will examine the offense of spying and determine whether, under the judicial scrutiny of the U.S. Supreme Court and the U.S. Court of Military Appeals and the dictates of modern international law, the mandatory death penalty for the offense is still required. To resolve this issue, three major areas will be discussed: the historical background of the offense of spying and its punishment, judicial precedents from the Supreme Court and the Court of Military Appeals concerning the death penalty and mandatory punishments, and the status of spying under current international law and opinion. In the end, the fate that would befall Captain Hale and Major John Andre in today's world for their crime of spying will have a definitive answer.

II. HISTORY OF THE OFFENSE AND ITS PUNISHMENT

A. AMERICAN STATUTORY PRECEDENT

Spying first became an offense in the United States during the Revolutionary War.[18] On 21 August 1776, the Continental Congress enacted the following resolution,

> That all persons, not members of, nor owing any allegiance to, any of the United States of America,...who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct.[19]

This legislation differs from the statutory provision currently in force in two major respects. First, under this resolution, the offense of spying could only be committed by aliens. In other words, U.S. citizens did not fall within the scope of the offense.[20] Second, and more importantly, the punishment for spying was not a mandatory death sentence.[21] To the contrary, a court-martial had the discretion to award death or "such other punishment" as it directed. Thus, the earliest U.S. legislative provision to deal with spying, the one adopted by America's founding fathers, did not require the imposition of the death penalty for the offense, but rather delegated the determination of an appropriate sentence to the members of the court.

The next statutory provision to delineate the offense of spying did provide for a mandatory death sentence. This provision, enacted by the U.S. Congress

on 10 April 1806, was included as part of "An Act For establishing Rules and Articles for the government of the Armies of the United States," and it was inserted directly after the "Articles of War."[22] It read as follows:

> That in time of war, all persons not citizens of, or owing allegiance to the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.[23]

Not only did this provision provide for a mandatory death penalty, it also required that all spy offenses be tried by general courts-martial.[24] The provision maintained the earlier language that limited the commission of the offense to aliens; U.S. citizens could not come within the scope of the offense.[25]

The law against spying remained the same until the Civil War.[26] In 1862, Congress redrafted the law to accommodate the circumstances of a war between U.S. citizens:[27]

> That, in time of war or rebellion against the supreme authority of the United States, all persons who shall be found lurking as spies, or acting as such, in or about the fortifications, encampments, posts, quarters, or headquarters of the armies of the United States, or any of them, within any part of the United States which has been or may be declared to be in a state of insurrection by proclamation of the President of the United States, shall suffer death by sentence of a general court-martial.[28]

No longer was the spy statute only applicable to aliens. Under the new statutory language, "all persons" were subject to conviction, including U.S. citizens.[29] The purpose of the change was to allow the law to include "the class which would naturally furnish the greatest number of offenders, *viz*, officers and soldiers of the confederate army and civilians in sympathy therewith."[30] In addition, the "in time of war" requirement of the offense was broadened to include a time of "rebellion against the supreme authority of the United States."[31]

The jurisdiction of this 1862 spy law was restricted to offenses committed "within any part of the United States which has been or may be declared to be in a state of insurrection by proclamation of the President."[32] A year later, in 1863, Congress rewrote the statute and deleted this restrictive language.[33] The jurisdiction of the statute was expanded back to its original scope. The 1863 enactment also provided an additional forum in which to try a person accused of spying, a military commission.[34] In both the 1862 and 1863 versions of the spy statutes, the mandatory death penalty survived without modification.[35]

In 1873, Congress reenacted all the general and permanent U.S. statutes then in force and consolidated them into a volume entitled Revised Statutes of the United States.[36] The 1863 spy statute was reenacted as section 1343 of the Revised Statutes and was virtually identical to its predecessor.[37] This provision would remain unchanged until 1920 as follows:

> All persons who, in time of war, or of rebellion against the supreme authority of the

> United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.[38]

At approximately the same time in 1862 that Congress was refining the statutory definition of spying for the "armies of the United States,"[39] it also undertook to draft an offense of spying for the Navy. This offense, enacted as Article 4 of the Articles for the Government of the Navy of the United States, prohibited the following conduct:

> Spies, and all persons who shall come or be found in the capacity of spies, or who shall bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the navy to betray his trust, shall suffer death, or such other punishment as a court-martial shall adjudge.[40]

As clearly evident from its language, this spy statute did not mandate the death penalty, but rather allowed a court-martial the discretion to award death or "such other punishment" as it deemed appropriate. In this regard, the Navy spy provision was identical to the original legislation passed on the subject of spying by the Continental Congress.[41] The Navy spy statute, however, was at odds with the Army spy statute then in force on the matter of a mandatory death penalty.[42] This conflict between the Navy's discretionary punishment for spying and the Army's mandatory punishment for spying would continue until the passage of the Uniform Code of Military Justice in 1950.[43] As rewritten in the Revised

Statutes of 1873[44] and later codified in Title 34 of the U.S. Code as Article 5 of the Articles for the Government of the Navy,[45] the Navy spy statute did in other respects closely resemble the Army spy law:

> All persons who, in time of war, or of rebellion against the supreme authority of the United States come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court-martial may adjudge.[46]

As noted above, the Army spy law remained constant from 1863 to 1920 when it was finally incorporated within the Articles of War as Article 82.[47] The only substantive change made in 1920 was to eliminate the outdated Civil War language concerning "rebellion against the supreme authority of the United States."[48] The 1920 change did not restore the pre-Civil War aliens-only application of the offense. The "All persons" language of the 1863 statute was changed to "[a]ny person" in the 1920 version, but the offense maintained its applicability to U.S. citizens as well as aliens. Article 82, codified in Title 10, U.S. Code,[49] read as follows:

> Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.[50]

In 1950, in an effort to "unify, consolidate, revise, and codify" the Articles of War and the Articles for the Government of the Navy, Congress enacted and established a Uniform Code of Military Justice.[51] The Army spy statute, Article of War 82, and the Navy spy statute, Article 5, Articles for the Government of the Navy, were merged into one spy statute applicable to all the uniformed services.[52] The language of the new spy law was derived from Article of War 82, not from Article 5.[53] As such, the new law retained the mandatory death penalty provision. The only difference between Article of War 82, and the new spy law, Article 106, UCMJ, was that the scope of the new article was enlarged to accommodate Navy vessels, shipyards, military aircraft, and any manufacturing or industrial plant engaged in supporting a war effort.[54] As codified in Title 50 of the U.S. Code, the unified spy statute took the following form:

> Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.[55]

Although some concern was voiced in the legislative history of Article 106, UCMJ, about the language of the provision being too broad and about civilians in wartime being subject to trial by court-martial or military

commission, no concern or comment was raised about the mandatory death penalty.[56]

Finally, in 1956, Article 106, UCMJ, was enacted in its current form and codified in Title 10 U.S. Code:[57]

> Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.[58]

The only change from the previous law was the omission of the words "of the United States" as surplusage.[59]

The statutory development of Article 106, UCMJ, reveals two important points. First, the initial spy statute in the United States drafted by the Continental Congress did not require a mandatory death sentence.[60] Second, the spy law drafted by Congress for the U.S. Navy in 1862 and in effect until 1950 did not provide for a mandatory death sentence.[61] This law was in direct opposition to the U.S. Army spy statute in effect from 1806 to 1950 which did provide for a mandatory death sentence.[62] The anomaly created by these conflicting statutes was that if a person committed an act of spying against the U.S. Army, he would automatically receive a death sentence, but if that same person committed the same crime against the U.S. Navy, his punishment was left to the discretion of a court-martial. The Uniform Code of Military Justice resolved this anomaly in favor of the mandatory punishment. In so doing, however, Congress

discarded a century old Article for the Government of the U.S. Navy and rejected the precedent established by America's founding fathers in 1776.

B. HISTORICAL NATURE OF THE OFFENSE

In 1863, the first codification of the laws of land warfare issued to a national army was published for the U.S. Army as General Orders No. 100.[63] Prepared by Professor Francis Lieber, and popularly known as the Lieber Code, this code defined the meaning of being a spy and set forth the punishment for the offense.[64] Paragraphs 83, 88, 103, and 104 of the Lieber Code provided the basic principles governing a spy:

> 83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.
>
> 88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.
>
> The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.
>
> 103. Spies...are not exchanged according to the common law of war.
>
> 104. A successful spy...safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy..., but he may be held in closer custody as a person individually dangerous.[65]

At the time he wrote the code, Lieber had few written international law treatises from which to draw his ideas.[66] Perhaps the most influential book to discuss spying at the time was Vattel's *The Law of Nations*, written in 1758.[67] Vattel's views on spying were important not only for their influence on Lieber, but for their influence on other international law commentators as well.[68] Vattel wrote this early summary on spies:

> The employment of spies is a kind of clandestine practice or deceit in war. These find means to insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then give intelligence to their employer. Spies are generally condemned to capital punishment, and with great justice, since we have scarcely any other means of guarding against the mischief they may do us. For this reason, a man of honour, who is unwilling to expose himself to an ignominious death from the hand of a common executioner, ever declines serving as a spy; and, moreover, he looks upon the office as unworthy of him, because it cannot be performed without some degree of treachery. The sovereign, therefore, has no right to require such a service of his subjects, unless, perhaps, in some singular case, and that of the highest importance.[69]

Lieber and Vattel agreed on five aspects of spying. First, the act of spying could only occur during the time of war. Second, the spy is a "person." Use of the word "person" meant that a spy may be either a military member or a civilian. Since a spy need only be a person, then "it is not essential that [he] be a member of the army or resident of the country of the enemy: he may be a citizen or even a soldier of the nation or people against

whom he offends, and, at the time of his offense, legally within their lines."[70] Also, a spy who is solely a "person" "may either be an emissary of the enemy or one acting on his own accord."[71] Third, Lieber and Vattel agreed that a spy must act clandestinely, in disguise, or under false pretenses. The clandestine nature of the spy and the deception involved "constitute the gist" and, concurrently, the "aggravation" of the offense.[72] Fourth, they concluded that a spy must seek information from the enemy with the intent of passing the information on to the opposing side. Finally, both men concurred that death is an appropriate punishment for a spy.

Regarding punishment, Vattel asserted that spies are "generally" condemned to death. He specifically did not mandate death for the offense. The Lieber Code, on the other hand, did require death for the offense. At the time Lieber drafted his code, however, he was constrained in this area by two factors. First, his code was written during the American Civil War, when the offense of spying was a widespread problem,[73] and second, when his code was promulgated in 1863, the spying statute in effect for the armies of the U.S. mandated the death penalty for a spy.[74] Lieber, then, had little choice on the issue of punishment. Vattel's view certainly more closely reflected the international attitude. The German international law commentator, Bluntschli, inspired by Lieber and his codification of the Articles of War,[75] expressed the attitude of the time concerning the punishment for spying in his *Code of International Law* published in the late 1800's:

> The reason for the severe punishment of spies lies in the danger in which they place the military operations, and in the fact that the measures to which they resort are not considered honorable -- not because they indicate a criminal inclination. If acting under the orders of their government, they may well believe that they are fulfilling a duty; and they may be impelled by patriotic motives when acting of their own free will. The object of the death penalty is to deter by fear. The customs of war, indeed, prescribe hanging. Nevertheless it should only be resorted to as an extreme measure in the most aggravated cases; it would in most cases be out of all proportion to the crime. In modern practice it is treated more leniently, and a milder punishment, generally imprisonment, is now imposed....The threat of the death penalty may be necessary, but it can be carried into execution only in aggravated cases of positive guilt.[76]

From Bluntschli's writings, it is clear that by the late 1800's, international law did not in all cases prescribe the death penalty for spying. Although the death penalty was a permissible punishment for that offense, it was an "extreme measure" to be used only in the "most aggravated cases."[77] Punishment was intended to fit the crime, and a term of years in prison, instead of a death sentence, was seen as entirely proportional to many spy offenses.[78]

The Lieber Code served as a guide for the Hague Conventions of 1899 and 1907, conventions held to declare for the international community the laws and customs of war on land.[79] In the Annex to the Hague Convention No. IV of 18 October 1907, regulations were adopted relating to spies.[80] The United States was a signatory to that

treaty, the U.S. Senate ratified it in 1909, and it is still in force.[81] The pertinent four Hague Regulations that relate to the offense of spying are:

> Article 24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.
>
> Article 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.
>
> Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.
>
> Article 30. A spy taken in the act shall not be punished without previous trial.
>
> Article 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.[82]

The definition of a spy in the Hague Regulations mirrors that of the Lieber Code, except for one major discrepancy. To qualify as a spy under Article 29 of the Hague Regulations, a person must collect or attempt to collect information "in the zone of operations of a

belligerent."[83] Paragraph 88 of the Lieber Code has no such territorial limitation.[84] Thus, a Hague Convention spy would only be guilty if the spying activity occurred at or near the field of battle, while a Lieber Code spy could commit the act of spying at any situs, whether near the area of actual military operations or not.

In addition to the definition of spying, the Lieber Code and the Hague Regulations coincide on two other concepts. Both agree that a soldier, not in disguise, who has entered the zone of operations of the opposing army only seeking to obtain information, is not a spy.[85] Also, both agree that a military spy is immune from prosecution for the offense of spying if he is able to return to his own army before being captured.[86]

Two matters concerning the offense of spying that were either implied or understood in the Lieber Code are explicitly stated in the Hague Regulations. First, Article 24 of the Hague Regulations recognizes that spying is not a violation of the law of war by providing that "the employment of measures necessary for obtaining information about the enemy and the country are considered permissible" under international law.[87] Lieber had implied the same concept in Paragraph 101 of his code when he wrote that "deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare."[88] Article 24 simply clarified the area and left no doubt as to the legality of a country using spies in war.[89] Consequently, "[s]pies are in no sense dishonorable."[90] Lieber made clear that spies are punished, not as violators of the

law of war, but because "they are so dangerous, and it is so difficult to guard against them."[91] "Punishment of captured spies is permitted as an act of self-protection, the law equally permitting the one to send spies, the other to punish them if captured."[92]

Second, Article 30 of the Hague Regulations requires that a spy receive a trial before he may be punished.[93] Although the Lieber Code never mentioned the requirement of a trial for a spy, at the time the code was drafted during the American Civil War, the spy statute in effect for the armies of the U.S. did require a trial by general court-martial for the offense,[94] and both the Union and the Confederacy did in actual practice provide trials for spies.[95] Article 30 was intended to ensure against abuses of the general practice.[96]

The Hague Regulations legitimized the use of spying in wartime and required a trial for any captured spy before punishment could be imposed, but they failed to provide any guidance whatsoever as to an appropriate punishment for the offense. When the Hague Regulations were developed and ratified in the early 1900's, the most persuasive American precedent on military law was Colonel William Winthrop's treatise, *Military Law and Precedent*.[97] In his treatise, Winthrop discussed the punishment for the spy, and his writings acknowledged the Vattel/Bluntschli standard while noting the American statutory constraint placed on Lieber: "By the law of nations the crime of the spy is punishable with death, and by our statute this penalty is made mandatory upon conviction."[98] From this statement, it is clear that,

in Winthrop's opinion, death was not a mandatory punishment for spying in the international community, only a permissive one; the U.S. requirement for mandatory death was a consequence of statute rather than the law of nations. Winthrop noted further that even the American mandate for death in the case of a spy was not always followed -- at least for women.[99] On this subject, he commented: "In some instances, women (who, by reason of the natural subtlety of their sex, were especially qualified for the *role* of the spy,) were sentenced to be hung as spies, though in their case this punishment was rarely if ever enforced."[100]

Colonel Winthrop took no personal position on whether the death penalty should be mandatory or permissive for the offense of spying. He did, however, offer an extended commentary on why death was an acceptable punishment for the offense.[101] This commentary, although almost a century old, remains timely:

> It may be observed, however, that the extreme penalty is not attached to the crime of the spy because of any peculiar depravity attaching to the act. The employment of spies is not unfrequently resorted to by military commanders, and is sanctioned by the usages of civilized warfare; and the spy himself may often be an heroic character. A military or other person cannot be required by an order, to assume the office of spy; he must *volunteer* for the purpose; and where so volunteering, not on account of special rewards offered or expected, but from a courageous spirit and a patriotic motive, he generously exposes himself to imminent danger for the public good and is worthy of high honor. Where indeed a member of the army or citizen of the country

> assumes to act as a spy against his own government in the interest of the enemy, he is chargeable with perfidy and treachery, and fully merits the punishment of hanging; but--generally speaking--the death penalty is awarded this crime because, on account of the secrecy and fraud by means of which it is consummated, it may expose an army, without warning, to the gravest peril; and, as Vattel observes, '[since we have scarcely any other means of guarding against the mischief they may do us].'[102]

Winthrop differentiated two types of spies: the honorable spy, who works on behalf of his country, is a person of great courage and patriotism, and deserves high honor, and the dishonorable spy, who works for the enemy against his own country, is a person of great treachery, and deserves hanging. According to Winthrop, despite the qualitative difference in character between the two individuals, both were subject to receiving the death penalty in order to deter an act that could result in the loss of an entire army. Winthrop left unsaid, however, whether he believed the honorable spy, although subject to a capital penalty, should receive an automatic death sentence, without consideration of his character.

C. UCMJ/MCM DEFINITION AND SCOPE

Five elements must be proven to sustain a conviction for the offense of spying under Article 106, UCMJ.[103] These elements are:

> (1) That the accused was found in, about, or in and about a certain place, vessel, or aircraft within the control or jurisdiction of an armed force of the United States, or a shipyard, manufacturing or industrial plant,

or other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere;

(2) That the accused was lurking, acting clandestinely or under false pretenses;

(3) That the accused was collecting or attempting to collect certain information;

(4) That the accused did so with the intent to convey this information to the enemy; and

(5) That this was done in time of war.[104]

The definition of spy in Article 106, UCMJ, resembles the one in the Lieber Code more so than the one in the Hague Regulations. As noted earlier, the Lieber Code definition and the Hague Convention definition differed only in one major factor, location of the offense. The same difference is carried over into the UCMJ. By the Hague definition, to qualify as a spy, a person must obtain or seek to obtain information within the "zone of operations."[105] No such limitation exists in Article 106, UCMJ. Under Article 106, UCMJ, a person can commit the offense within the zone of operations or "elsewhere."[106]

Although facially straightforward, the five elements of spying in Article 106, UCMJ, reveal, on closer examination, certain definitional problems. First, spying can only occur if committed during a "time of war."[107] Nowhere in the UCMJ, however, is "time of war" defined, and there are no reported cases that have construed that phrase for purposes of Article 106, UCMJ.[108] To define "time of war" for Article 106, UCMJ, it is necessary to look by analogy to the definition the Court of Military Appeals has subscribed to it in

construing other articles in the UCMJ containing the same phrase.[109]

In general, the court has determined that "time of war" refers not only to a war formally declared as such by Congress, but also to an undeclared war whose "existence is to be determined by the realities of the situation as distinguished from legal niceties."[110] The practical considerations examined by the court to determine whether a time of war exists include: (1) "the very nature of the...conflict [and] the manner in which it is carried on"[111] (2) "the movement to, and the presence of large numbers of American men and women on, the battlefields...[and] the casualties involved,"[112] (3) "the drafting of recruits to maintain the large number of persons in the military service,"[113] (4) "the ferocity of the combat,"[114] (5) "the extent of the suffering,"[115] (6) "the national emergency legislation enacted and...the executive orders promulgated...and the tremendous sums being expended for the express purpose of keeping our [troops] in the...theatre of operations,"[116] (7) the authorization of combat pay for officers and enlisted personnel,[117] and finally, (9) "the existence *in fact* of substantial armed hostilities."[118] "Of crucial importance" for the court "in all of the cases" is the last consideration, "the existence of armed hostilities against an organized enemy."[119] Thus, when actual hostilities begin, a time of war begins, "regardless of whether those hostilities have been formally declared to constitute 'war' by action of the Executive [or] Congress"[120]; when actual hostilities cease, a time of war

ceases.[121]

The 1984 Manual for Courts-Martial (1984 Manual) defines a time of war as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants [such] a finding."[122] This definition must be read in conjunction with the practical guidance offered by the Court of Military Appeals to resolve the issue. At trial, if it is clear as a matter of law that the offense of spying occurred "in time of war," the judge will resolve the issue as an interlocutory question, and the members will be so advised.[123] If, however, there exists a factual dispute as to whether the offense occurred in time of war, the triers of fact must decide the issue themselves in determining the guilt or innocence of the accused.[124]

In addition to looking at practical considerations, the Court of Military Appeals has held that the meaning of "time of war" in any particular article of the UCMJ "must be determined with an eye to the goal toward which that [a]rticle appears to have been directed."[125] In other words, "whether a time of war exists depends on the purpose of the specific article in which the phrase appears."[126] With regard to the spying provision of the UCMJ, the drafters to the 1984 Manual noted that "under the article-by-article analysis used by the Court of Military Appeals to determine whether time of war exists, 'time of war' as used in Article 106 may be narrower than in other punitive articles, at least in its application to civilians."[127] The reason for this commentary is found in *United States v. Averette*.[128]

In *Averette*, the Court of Military Appeals considered the meaning of the phrase "in time of war" as used in Article 2(10), UCMJ.[129] Article 2(10), UCMJ, provides that "[i]n time of war, persons serving with or accompanying an armed force in the field" (civilians) are subject to the provisions of the UCMJ.[130] After reviewing the history of military jurisdiction over civilians and the judicial precedent that had construed the term "time of war," the court concluded that for purposes of Article 2(10), UCMJ, the phrase translated to "a war formally declared."[131] "A broader construction of Article 2(10)," the court stated, "would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs."[132] In the opinion of the court, guidance from the Supreme Court in the area of military jurisdiction over civilians mandated a "strict and literal construction of the phrase."[133] The court specifically limited its holding to this one proposition: "[F]or a civilian to be triable by court-martial in 'time of war,' Article 2(10) means a war formally declared by Congress."[134]

The decision in *Averette* impacts on Article 106, UCMJ, because under that article, "any person," to include a civilian, may be guilty of spying "in time of war."[135] What *Averette* does, in essence, is restrict the application of Article 106, UCMJ, in the case of civilians. Based on the *Averette* holding, the military court system would lack the jurisdiction to try a civilian for the offense of spying if the alleged act occurred prior to a formal declaration of war by

Congress.[136] Thus, in an undeclared war, such as the Korean or Vietnam war, a civilian accompanying the armed forces in the field would not be subject to trial by court-martial for spying, even if the offense occurred during a time of substantial armed hostilities. On the other hand, applying the Court of Military Appeals definition of "time of war" for all others, a military member would be subject to trial by court-martial for spying in an undeclared war, as long as there existed substantial armed hostilities. In these circumstances, civilians, whether allied or enemy, would be afforded different treatment than their military counterparts. The only way to avoid this disparate treatment would be to interpret the "in time of war" phrase in Article 106, UCMJ, as strictly referring to a war formally declared by Congress and to apply that interpretation to both civilian and military offenders alike.

The ambiguity of the phrase "in time of war" in Article 106, UCMJ, and the possibility that its definition could vary depending on whether the accused is a civilian or a military member, creates an uncertainty in the proof and application of the offense of spying. Another uncertainty is added by the use of the words, "any person" in Article 106, UCMJ.

The 1984 Manual for Courts-Martial states that the words "any person" "bring within the jurisdiction of general courts-martial and military commissions all persons of whatever nationality or status who commit spying."[137] Despite this unequivocal assertion, the scope of the jurisdiction of Article 106, UCMJ, created by the

words "any person" is not altogether clear from the few court decisions in the area. The problem stems from the U.S. Supreme Court's ruling in *Ex parte Milligan*.[138]

In *Ex parte Milligan*, the Supreme Court considered whether a military commission convened during the Civil War had jurisdiction to try a U.S. civilian accused of communicating with and giving aid and comfort to rebels against the United States in violation of the laws of war.[139] The alleged offenses occurred in a state not involved in the rebellion and were committed by a U.S. citizen who had never been in the military service.[140] The Court held that where violations of the laws of war were committed outside the zone of military operations, by a civilian not attached in any way to the military, and in a state in which the civil courts were still operating, a trial by military commission was unconstitutional.[141] In conjunction with the holding, the Court did concede that when civil courts are closed during a war, a military commission does have the power to try civilians in "the theater of active military operations, where war really prevails."[142] For purposes of Article 106, UCMJ, however, *Ex parte Milligan* would appear to deny military commissions the authority to try civilians not accompanying or associated with the armed forces for the offense of spying committed outside the zone of wartime hostilities.[143]

During World War I, the Attorney General of the United States followed the holding of *Ex parte Milligan* in the case of Pable Waberski, a civilian German spy who tried to enter the United States across the Mexican

border under the direction of the German ambassador to Mexico.[144] Waberski was apprehended by military authorities when he crossed the border into the U.S., and he was ordered to be tried by court-martial as a spy for violating the 82d Article of War.[145] The Attorney General recited the pertinent facts of the case: Waberski "had not entered any camp, fortification or other military premises of the United States"; he had not "been in Europe during the war, so he had not come through the fighting lines or field of military operations"; he was a civilian unattached to any armed force; and "the regular federal civilian courts were functioning."[146] In view of all of these facts and the decision in *Ex parte Milligan*, the Attorney General concluded:

> [I]n this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside the field of military operations or territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers.[147]

Thus, the Attorney General found that Waberski, a civilian spy unattached to an armed force and operating outside of the zone of military operations, was not subject to the jurisdiction of a court-martial, and would have to be tried by the civilian criminal court system.[148]

A year later, this ruling was overturned by the Attorney General in the face of newly presented facts.[149] The evidence now showed that Waberski had crossed the border from Mexico into the United States three times within twenty-four hours prior to his arrest, and when

he was arrested, he was only "about a mile from encampments where were stationed officers and men engaged in protecting the border against threatened invasion from the Mexican side."[150] These facts, "coupled with the further fact that [Waberski] at the time of his arrest was found 'lurking or acting as a spy'," persuaded the Attorney General to reverse his prior decision and find that a court-martial had jurisdiction to try him as a spy under Article 82, despite his status as enemy alien unattached to an armed force. In essence, jurisdiction attached because Waberski was determined to have been within the zone of military operations.

After the second Waberski case, the precedential value of *Ex parte Milligan* was eroded further in three federal court cases. The first of these cases was *United States ex rel. Wessels v. McDonald*.[151] In the *Wessels* case, the federal district court for the eastern district of New York considered a petition for a writ of habeas corpus from a German citizen who had been arrested in New York City during World War I and who was to be tried by the U.S. Navy at a court-martial for spying in violation of Article 5 of the Articles for the Government of the Navy.[152] The sole inquiry in the case was whether the court-martial had jurisdiction over the accused German spy, a man who had masqueraded for two years in New York as a Swiss citizen, but who in fact was a German naval officer.[153] The defense contended that because the United States was outside the zone of war operations and because the civil courts in the United States were functioning, the rule of *Ex parte Milligan* controlled, and as a

result, the court-martial lacked the jurisdiction to try the German.[154] The federal district court disagreed.[155]

Although the district court could easily have distinguished this case from *Ex parte Milligan* through reference to the accused man's membership in the armed forces of the enemy, the court focused instead on the matter of zone of military operations.[156] The district court determined that New York City was within the zone of operations for the war, and that therefore the holding of *Ex parte Milligan* was not binding:

> In this great World War through which we have just passed, the field of operations which existed after the United States entered the war, and, especially in regard to naval operations, brought the port of New York within the field of active operations. The implements of warfare and the plan of carrying it on in the last gigantic struggle placed the Untied States fully within the field of active operations. The term 'theater of war,' as used in the Milligan Case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations....It is not necessary that it be said of the accused that he entered forts or armed encampments in the purposes of his mission....It is sufficient if he was here on the mission of a spy and communicated his intelligence or information to the enemy.[157]

Next, in the case of *Ex parte Quirin*, the Supreme Court considered whether a military commission had authority to try seven German citizens and one alleged American citizen who had landed on the east coast of the United States from a German submarine in 1942.[158]

Arriving ashore wearing German Marine Infantry uniforms or parts of uniforms, all of the accused men had immediately changed to civilian dress and proceeded to various cities in the United States.[159] They had all "received instructions in Germany from an officer in the German High Command to destroy war industries and war facilities in the United States."[160] After their capture, the President appointed a military commission to try the eight accuseds. Charges alleging violations of both the law of war and the Articles of War, to include the offense of spying in Article 82, were lodged against them.[161] The defense argued the applicability of the rule of *Ex parte Milligan* and contended that the trial should take place in the civil courts of the United States, and not in the military courts, so long as the civil courts were "open and functioning normally."[162] The Supreme Court found *Ex parte Milligan* distinguishable on the facts.[163]

In the opinion of the Court, Milligan had not been "a part of or associated with the armed forces of the enemy," and he was therefore "a non-belligerent, not subject to the law of war."[164] On the contrary, the Court found that the eight accuseds in *Ex parte Quirin* were in fact associated with the armed forces of the enemy and consequently were "enemy belligerents,"[165] subject to trial by a military commission:

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries and were held in good faith for

> trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform -- an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.[166]

Having decided that a military commission could try an enemy belligerent for a violation of the law of war, the Court expressly declined to consider the constitutionality of a military commission trying an enemy belligerent for spying under the 82d Article of War.[167] The Court did discuss the applicability of its ruling to a U.S. citizen:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the ...law of war.[168]

Over a decade after the Supreme Court's decision in *Ex parte Quirin*, the 10th Circuit Court of Appeals decided a similar case in *Colepaugh v. Looney*.[169] The facts in the case revealed that in 1944, Colepaugh, a U.S. citizen wearing civilian clothes, had secretly come ashore on the coast of Maine from a German submarine.[170] He carried "forged credentials and other paraphernalia useful in his assigned mission of espionage" for the German Reich.[171] He was arrested, tried before a military

commission for violations of the law of war, spying in violation of the 82d Article of War, and conspiracy, and convicted of all charges.[172] The 10th Circuit, relying on the holding in *Ex parte Quirin*, rejected Colepaugh's argument that the military commission had no jurisdiction to try a U.S. citizen.[173] The court held that because the evidence showed Colepaugh to be an enemy belligerent, his U.S. citizenship did not divest the military commission of jurisdiction over him.[174] Although the Supreme Court in *Ex parte Quirin* only approved the jurisdictional reach of the military commission for violations of the law of war, the 10th Circuit expanded the reach of the military commission by affirming the offense of spying as well as the offenses against the law of war.[175] No explanation was provided by the 10th Circuit for this expansion, and the Supreme Court denied certiorari in the case.[176]

What *Ex parte Quirin* and *Colepaugh v. Looney* leave unresolved is whether an American citizen or an enemy alien, who is living in the U.S. and who is neither associated with the armed forces of the enemy nor within the zone of military operations, is subject to trial before a military commission for the offense of spying under Article 106, UCMJ.[177] Assuming that *Ex parte Milligan* remains good law after *Ex parte Quirin*, an argument can be made that both such individuals are not amenable to trial by a military tribunal for spying. The tenor of the decision in *Ex parte Quirin* would tend to diminish that argument, but the scope of the jurisdiction of Article 106, UCMJ, created by the words "any person" remains an unsettled issue.

Apart from the problems with the use of the terms "in time of war" and "any person" in Article 106, UCMJ, the remainder of the elements and proof of the offense are generally not controversial and follow the historical model. To be a spy, a person, either a military member or a civilian, must lurk or act "clandestinely or under false pretenses" while "collecting or attempting to collect" information "with the intent to convey" it to the enemy.[178] The person need not obtain the information or communicate it to be guilty of the offense: "The offense is complete with lurking or acting clandestinely or under false pretenses with intent to accomplish these objects."[179] Intent to pass information to the enemy "may be inferred from evidence of a deceptive insinuation" of the person among the opposing force.[180] The defense may rebut this inference, however, with evidence that the person had entered enemy lines "for a comparatively innocent purpose," such as "to visit family or to reach friendly lines by assuming a disguise."[181] Finally, three specific categories of persons are expressly excluded from the definition of spying:

> (a) Members of a military organization not wearing a disguise, dispatch drivers, whether members of a military organization or civilians, and persons in ships or aircraft who carry out their missions openly and who have penetrated enemy lines are not spies because, while they may have resorted to concealment, they have not acted under false pretenses.
>
> (b) A spy who, after rejoining the armed forces to which the spy belongs, is later captured by the enemy incurs no responsibility for previous acts of espionage.

> (c) A person living in occupied territory who, without lurking, or acting clandestinely or under false pretenses, merely reports what is seen or heard through agents to the enemy may be charged under Article 104 with giving intelligence to or communicating with the enemy, but may not be charged under this article as being a spy.[182]

One last definitional problem surfaces in the second category of persons not considered to be a spy, the spy who rejoins his unit but is later captured.[183] As noted earlier, this category existed under the Lieber Code and the Hague Regulations. In fact, the wording used in drawing the category for the 1984 Manual for Courts-Martial is virtually identical to that used in Article 31 of the Hague Regulations.[184] By the terms of the category, the exclusion only applies to those who can rejoin an armed force: members of the military. Civilians do not qualify under the exclusion. Thus, a military spy who goes behind enemy lines and returns undetected to his unit cannot be punished as a spy if he is later captured; he must upon capture be accorded the rights of a prisoner of war. The civilian spy, on the other hand, who goes behind enemy lines and returns home undetected, can be punished as a spy if he is later captured; he remains a spy under the law. Two international law commentators have recognized this unfair treatment, but provide no rationale for it.[185] The analysis to the 1984 Manual for Courts-Martial neither explains nor mentions the disparity in treatment.[186]

D. UCMJ/MCM SENTENCING PROCEDURE

In Article 106 of the UCMJ, Congress unequivocally stated that anyone convicted of spying "shall be punished by death."[187] As noted earlier, this is the only offense under the UCMJ that mandates capital punishment solely on the basis of conviction alone.[188] Because of this unique punishment, Congress also mandated in Article 51, UCMJ, a unique voting procedure for conviction. Whereas conviction of any other UCMJ offense requires the concurrence of two-thirds of the members, conviction for spying cannot result unless all of the members unanimously agree on guilt.[189] In addition, a court-martial for spying must be a general court-martial, as opposed to any lesser form of court-martial,[190] and the composition of that general court-martial must consist of a military judge and not less than five members.[191] A trial by military judge alone is not option for an accused in a prosecution for the offense of spying.[192] Furthermore, the trial will be contested; a guilty plea may not be accepted as to any offense under the UCMJ for which the death penalty may be adjudged.[193]

Even though by law conviction for spying requires a death sentence, the President, by executive order in promulgating the 1984 Manual for Courts-Martial, requires that sentencing proceedings nevertheless be conducted.[194] These sentencing proceedings mirror those conducted in every other court-martial in which a guilty finding to a punitive article is entered. The trial counsel is first permitted to present evidence in aggravation, and

in turn, the defense counsel may present any matter in extenuation and mitigation.[195] The trial counsel may then present rebuttal and the defense surrebuttal.[196] During this sentencing phase, the rules of evidence are generally relaxed for the defense's case.[197] In fact, as a consequence of spying being a capital case, the defense is granted "unlimited opportunity to present mitigating and extenuating evidence" on sentencing.[198] At the conclusion of the presentation of evidence on sentencing, counsel for both sides are permitted to argue for an appropriate sentence.[199]

After argument, unlike any other capital case tried under the UCMJ, the members do not vote on sentence; the military judge is directed by the 1984 Manual simply to announce to the court that by operation of law, a sentence of death is adjudged.[200] Automatically included within this sentence is a dishonorable discharge (or dismissal) from the service.[201] Additionally, confinement is considered a "necessary incident" to the sentence, although technically "not a part of it."[202] An enlisted person in a pay grade above E-1 will be reduced by operation of law to the lowest enlisted pay grade when the convening authority approves the sentence.[203]

Article 52(b)(1) of the UCMJ provides that "[n]o person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial...and for an offense...expressly made punishable by death."[204] This provision would appear to indicate that Congress intended that the members vote on a sentence after they had convicted an accused of spying. As noted above,

however, the sentencing scheme adopted by the President in the 1984 Manual does not allow the members to vote on sentence in such a case.

In a recent opinion, Chief Judge Everett of the Court of Military Appeals, mentioned this discrepancy and reasoned that "the President apparently has concluded that, for a mandatory death sentence, no vote by the members on sentence is necessary and that the military judge should simply announce the death sentence."[205] Unfortunately, because this particular issue was not before the court, neither the Chief Judge nor any other member of his court provided any insight into whether the judge-announced sentence for spying is violative of the Congressional mandate for a unanimous members' vote set forth in Article 52(b)(1).[206] In view of the fact that the clear language of the statute requires a unanimous members' vote before any accused may be sentenced to death, the Court of Military Appeals, when confronted with the issue, may have no choice but to invalidate the judge-announced sentence scheme as being contrary to law.

Certainly two problems with the judge-announced sentence for a spy are readily apparent. First, it does not allow the imposition of forfeitures. Under the scheme, the military judge only announces that the accused will be put to death. While this sentence, as previously noted, will automatically invoke a dishonorable discharge (or dismissal), confinement until execution, and a reduction to E-1 for an enlisted member, it will not provide for forfeitures from the convicted spy's pay. That means the spy will continue to receive

his full pay until the review process is complete and the death sentence ordered executed. If the case were given to the court members to decide a sentence, they could award forfeitures, in addition to the mandatory punishment, and the forfeitures would go into effect as soon as the convening authority approved the sentence.[207] Considering that years may elapse between the initial convening authority's action and final appellate review of the case, the monetary value of these forfeitures would be substantial.

The second problem with the judge-announced sentence for spying is that in the only two other cases where a mandatory punishment exists under the UCMJ, premeditated murder and felony murder, the members are indeed allowed to vote on sentence.[208] In a non-capital prosecution of either premeditated or felony murder, for example, once the accused has been convicted by the members, the adjudged sentence must by law include confinement for life.[209] Despite the fact that the life sentence is mandatory, the members nevertheless are required to vote on sentence.[210] No apparent reason exists for treating a mandatory death penalty any differently. If the members were allowed to vote on the mandatory death penalty for spying, their vote could serve three purposes. First, the members could exercise their discretion and impose what they believed to be appropriate forfeitures.[211] Second, they would be free to include a recommendation for clemency in their sentence.[212] Finally, they could engage in "jury nullification" and adjudge a sentence less than the mandatory one required by the UCMJ.[213] None

of these purposes can be accomplished if the members have no vote on sentence and the military judge simply announces that by law the accused is to be put to death.

No matter who ultimately will be held to be the proper one to announce the death sentence in a spy case, the members or the military judge, the sentencing phase of the court-martial, although ostensibly meaningless in view of the mandatory punishment, serves an important purpose. As noted in the analysis to the 1984 Manual, it allows reviewing authorities "to have the benefit of any additional relevant information."[214] These reviewing authorities play the next crucial role in determining whether the death sentence for spying will be executed.

At the completion of the court-martial for spying, a verbatim written transcript is prepared,[215] and the record of trial is authenticated by the military judge,[216] served on the accused,[217] and forwarded for initial review and action to the officer who convened the general court-martial.[218] Prior to taking any action on the death sentence, the convening authority refers the record of trial to his staff judge advocate (SJA) for a recommendation.[219] The SJA reviews the record of trial and makes a specific recommendation to the convening authority as to the action to be taken on the sentence.[220] Before returning the record of trial with his recommendation to the convening authority, the SJA first serves a copy of his recommendation upon the accused's counsel.[221] The counsel for the accused may then make a written submission to the convening authority in rebuttal to the SJA's recommendation.[222] At any time during the

period from the announcement of sentence until ten days after the service of the SJA's recommendation, the accused may submit any written matters to the convening authority "which may reasonably tend to affect [his] decision whether to disapprove any findings of guilty or to approve the sentence."[223]

After the convening authority reviews his SJA's recommendation, the record of trial, and any matters submitted by the accused or his counsel, he must take action on the death sentence and he may take action on the findings.[224] What specific action he decides upon is, as noted by Congress in the UCMJ, a "matter of command prerogative" and within his own "sole discretion."[225] The convening authority must personally take the action and cannot delegate the function.[226]

Although he is not required to act on the findings of guilty to a charge and specification of spying, the convening authority nonetheless has the unbridled authority to set aside the findings and dismiss the specification and charge,[227] and he can do so with or without a reason.[228] Assuming that he takes no action to set aside the findings, however, he must at a minimum explicitly decide in writing whether to approve or disapprove the mandatory death sentence.[229] Despite the fact that the death sentence is mandatory at the court-martial level, the convening authority may mitigate the punishment at his level by changing it to one of a different nature, such as to life imprisonment or to confinement for a term of years, or he may simply disapprove it altogether and substitute no lesser

punishment in its place.[230] He needs no reason whatsoever to reduce or disapprove the death sentence.[231] If his discretion in this area is limited at all, it is by the prescription in the 1984 Manual that he "shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused."[232] Because the statutory language of Congress quoted earlier gives the convening authority "sole discretion" in the area of sentence approval, however, this 1984 Manual language can only be considered as advisory. The sole actual limitation on the convening authority in taking action on sentence is that he may not suspend a sentence to death for any probationary period.[233] In fact, no one, to include the President, may suspend a sentence to death.[234]

If after reviewing the trial record, his SJA's recommendation, and all the matters submitted by the accused and his counsel, the convening authority approves the sentence to death, he sends the entire case forward to his service Judge Advocate General.[235] The convening authority does not have the power to order the death sentence executed; only the President possesses that authority.[236]

The service Judge Advocate General refers the case for review to the Court of Military Review, a court composed of appellate military judges.[237] That court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[238] If the Court of Military Review affirms the findings of guilty for the offense of

spying as well as the sentence to death, the case must then be reviewed by the Court of Military Appeals, a court consisting of appellate civilian judges.[239] This court will review the entire record and take action on the findings and sentence "with respect to matters of law."[240] If the court affirms the findings and the sentence, its decision becomes subject to review by the U.S. Supreme Court on writ of certiorari.[241] If the Supreme Court grants a writ of certiorari, that Court has appellate jurisdiction "both as to law and fact."[242] If the Supreme Court either affirms the decision of the Court of Military Appeals or denies the writ of certiorari, the judicial examination of the findings and death sentence for spying is finally complete.[243]

At this point in the review process, the service Judge Advocate General must send the record of trial, the decisions of the Court of Military Review and Court of Military Appeals, and the decision of the Supreme Court, if any, to his service Secretary along with his own recommendation as to the disposition of the case.[244] The service Secretary must then forward the case to the President for final action.[245] The President has absolute discretion to approve the death sentence or to commute or remit it.[246] Only the President may order the execution of a death sentence for spying.[247] If the President approves the death sentence, the case is returned to the service Secretary, who then prescribes the manner in which the execution will be carried out.[248]

In the past, the military services either hanged or shot prisoners sentenced to death.[249] The last military

execution occurred in 1961 when an Army enlisted man was hanged at the Disciplinary Barracks, Fort Leavenworth, Kansas, for the rape and attempted murder of an 11 year old girl.[250] The current preferred method of execution in the Army is by lethal injection.[251]

The death penalty is an authorized, but not a mandatory, punishment for several offenses under the UCMJ other than spying.[252] The capital punishment procedures established in the 1984 Manual for these offenses, however, are significantly different from those procedures discussed above for spying.[253] First, prior to an accused being arraigned for a capital offense other than spying, if the government wishes to pursue the death penalty, the trial counsel must give the defense counsel notice that he intends to prove at least one of the eleven aggravating factors promulgated by the President for use in a capital case.[254] Second, the members vote on the appropriate sentence in all death penalty cases other than spying.[255] In order to adjudge a death sentence for these other capital offenses, the members must initially convict the accused by unanimous vote.[256] Although the UCMJ only requires a two-thirds concurrence of the members to convict the accused of any offense other than spying, the 1984 Manual prohibits the members from even considering the death penalty on sentence unless all of the members have unanimously voted to convict the accused during the findings phase of the trial.[257] After convicting the accused and after having heard all of the evidence in the sentencing phase of the trial, the members must then unanimously find beyond a reasonable

doubt the existence of at least one aggravating factor[258] and unanimously concur that any extenuating and mitigating circumstances were "substantially outweighed" by any of the aggravating circumstances and factors of the case.[259]

These procedures "are designed to ensure that a death penalty is adjudged only after an individualized evaluation of the accused's case, and only after specific aggravating factors are found to have been present."[260] The 1984 Manual specifically provides that during sentencing, the defense will be given "broad latitude to present evidence in extenuation and mitigation."[261] In addition, the military judge must instruct the members prior to their voting on sentence to "consider all evidence in extenuation and mitigation before they may adjudge death."[262] In announcing a sentence of death, the president of the court must announce which aggravating factors were unanimously found by the members during their deliberations.[263] The members not only vote on death, but unlike the judge-announced mandatory death sentence for spying, they may also vote on the type of discharge, reduction, forfeitures, and whatever other punishment they deem appropriate to award as a sentence.[264]

The differences in the sentencing procedures required for the offense of spying and those required for other capital offenses under the UCMJ are important because they reflect a difference in adherence to U.S. Supreme Court precedent in the area of death sentencing. The sentencing procedures for those capital offenses

other than spying were adopted to conform as closely as possible with U.S. Supreme Court decisions; the sentencing procedures for spying were not.[265] The analysis to the 1984 Manual cites three reasons for treating the offense of spying differently from the other capital offenses: (1) "Congress recognized that in the case of spying, no separate sentencing determination is required."; (2) "[The Supreme Court] has not held that a mandatory death penalty is unconstitutional for any offense."; and (3) "[D]eath has consistently been the sole penalty for spying in wartime since 1806."[266] Whether the unique sentencing procedures for spying and its mandatory death sentence are constitutional in light of these reasons or for any other requires a thorough examination of judicial death penalty precedent.

III. JUDICIAL DEATH PENALTY PRECEDENT

The eighth amendment to the U.S. Constitution prohibits the infliction of "cruel and unusual punishments."[267] Similarly, Article 55 of the UCMJ prohibits cruel and unusual punishment, and also specifically prohibits punishment by flogging, by branding, marking, or tattooing on the body, and by the use of irons, single or double.[268] Both the U.S. Supreme Court and the Court of Military Appeals, respectively, have interpreted the meaning of these provisions as they apply to the imposition of the death penalty as a punishment. The judicial guidance from these interpretations provide a basic framework for determining

when and how the death penalty may constitutionally be imposed. The constitutionality of the mandatory death penalty for spying has never been determined by either the Supreme Court or the Court of Military Appeals. By applying their judicial death penalty precedents to Article 106, UCMJ, however, it is possible to fairly judge the constitutionality of the mandatory death penalty for spying. Two basic questions must be answered from the precedents. First, does the offense of spying warrant capital punishment? And, second, assuming the offense of spying does warrant capital punishment, is a mandatory death sentence upon conviction of the offense permissible?

A. SUPREME COURT PRECEDENT

In interpreting the cruel and unusual punishment clause of the eighth amendment, the Supreme Court for over half a century has recognized the principle that a punishment should be proportionate to the crime committed.[269] The leading case to state this principle was *Weems v. United States*, decided in 1910.[270] In that case, a Philippine government official was convicted of making two minor false entries in a public document and sentenced to "cadena temporal,"[271] a punishment that "entailed a minimum of 12 years' imprisonment chained day and night at the wrists and ankles, hard and painful labor while so chained, and a number of 'accessories' including lifetime civil disabilities."[272] The Supreme Court held that the punishment was too harsh for the

offense committed and thus violative of the cruel and unusual punishment prohibition of the eighth amendment.[273] In arriving at its conclusion, the Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[274] The Court also described the cruel and unusual punishment clause as "progressive," "not fastened to the obsolete," and capable of acquiring meaning "as public opinion becomes enlightened by a human justice."[275] This description of the clause was phrased more eloquently in *Trop v. Dulles*, where in a plurality opinion, Chief Justice Warren asserted that the eighth amendment drew much of its meaning from "the evolving standards of decency that mark the progress of a maturing society."[276]

In 1972, the Supreme Court in *Furman v. Georgia* considered the question whether the imposition and carrying out of the death penalty in a murder case and two rape cases before it constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[277] In a *per curiam* decision, the Court held that the imposition of the death penalty in those particular cases did, in fact, violate the cruel and unusual punishment clause.[278] All nine justices submitted separate opinions, five concurring in the result and four dissenting.[279] Of those justices in the majority, two believed that the punishment of death for any offense was cruel and unusual, and therefore they concluded that the death penalty was *per se* unconstitutional.[280] The other three justices in the majority did not find the death penalty unconstitutional *per se*; they voted to reverse

for reasons primarily focused on the unfettered discretion given to the jury by the state on sentencing.[281] In the opinions of those justices, discretionary sentencing in a capital case, absent any state statutory guiding standards, violated the cruel and unusual punishment clause.[282] One of the justices described discretionary capital sentencing as "pregnant with discrimination."[283] Another claimed such sentencing allowed the death penalty to be imposed "wantonly" and "freakishly."[284] The third justice argued that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[285] Although the holding in *Furman* is far from clear, the case "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[286]

Following the Supreme Court's decision in *Furman*, many states enacted new death penalty statutes to address the concerns about unfettered sentencing discretion expressed by the Court in that case.[287] These states sought to resolve the discretion problem by either "specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence" or "making the death penalty mandatory for specified crimes."[288] In *Gregg v. Georgia*, the Court first considered the constitutionality of a statute that specified the factors to be weighed and the procedures

to be followed in imposing a death sentence.[289]

In *Gregg*, the defendant was convicted of murder and then sentenced to death in a bifurcated proceeding by a jury in Georgia.[290] Under the Georgia statutory sentencing scheme in issue, any person convicted of murder received a sentence either to death or life imprisonment.[291] For a death sentence to be adjudged, the jury had to find beyond a reasonable doubt at a separate sentencing hearing that at least one of ten specific statutory aggravating circumstances existed in the case.[292] If a statutory aggravating factor were not found, then a death sentence could not be imposed.[293] Even if such an aggravating factor were found, the jury retained the option to adjudge a life sentence.[294] At the sentencing hearing, the defendant could present to the jury any extenuating or mitigating evidence.[295] Once awarded, the death sentence received an automatic appeal to the state supreme court where the sentence was reviewed to determine if it was imposed in an arbitrary and capricious manner.[296] In a plurality opinion, the Supreme Court upheld the imposition of the death penalty for murder under this statutory scheme.[297]

Prior to considering the constitutionality of the Georgia sentencing procedure, the plurality of the Court in *Gregg* considered first whether death was *per se* a cruel and unusual punishment for the crime of murder.[298] To resolve this issue, the plurality constructed a three part test.[299] First, under contemporary values and standards of decency, was the punishment imposed considered by the American people as an inappropriate and

unnecessary sanction for the crime?[300] Second, did the punishment "involve the unnecessary and wanton infliction of pain?"[301] And, third, was the punishment "grossly out of proportion to the severity of the crime?"[302] An affirmative response to any of these questions would cause a punishment to violate the cruel and unusual punishment clause. Applying this test to the imposition of death for deliberate murder, the plurality of the Court answered all the questions in the negative. The plurality found first that a "large proportion of American society" continued to regard death as an appropriate punishment for murder.[303] Next, the plurality noted that the death penalty for murder served two possible social purposes, retribution and deterrence of capital crimes by prospective offenders, and therefore, it did not result in the "gratuitous infliction of suffering."[304] Finally, the plurality stated that when life has been deliberately taken by an offender, the imposition of the death penalty was not "invariably disproportionate to the crime."[305] Consequently, the plurality concluded that the death penalty for deliberate murder was constitutionally permissible.[306]

The plurality in *Gregg* next turned its attention to the requirement of *Furman* that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[307] The plurality analyzed the Georgia capital sentencing scheme to determine if it created such a risk. What the plurality found were procedures that were equal to the *Furman* test.

The plurality of the Court summarized its findings in this manner:

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.[308]
>
> Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate....[T]hese procedures...satisfy the concerns of *Furman*.[309]

In *Woodson v. North Carolina*, a case decided on the same day as *Gregg*, the Supreme Court considered the constitutionality of the other legislative response to *Furman*, a statute making the death penalty mandatory for specified crimes.[310] The defendants in this case were tried and convicted of first-degree murder in North

Carolina.[311] Under the North Carolina law at issue, any person found guilty of first-degree murder was required to receive a mandatory death sentence.[312] In compliance with that law, the defendants were sentenced to death.[313] No discretion on the sentence was allowed.[314] Reviewing this mandatory death penalty statute in light of the decisions in *Furman* and *Gregg*, a plurality of the Court found that it violated the cruel and unusual punishment clause of the Constitution in three areas.[315]

First, relying on an examination of history and traditional usage, jury determinations, and legislative enactments to determine societal values, the plurality determined that the mandatory death penalty statute conflicted with contemporary standards of decency.[316] The plurality surveyed the history of mandatory death penalty statutes in America and found that "the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid."[317] Next, the plurality assessed jury determinations and discovered that for two hundred years, American jurors had, "with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."[318] Finally, the plurality examined legislative enactments and ascertained that, prior to the *Furman* decision, every state in the United States, as well as the federal government, had rejected automatic death penalty statutes and replaced them with discretionary jury sentencing.[319] The plurality of the Court concluded that "one of the most significant developments in our

society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense."[320]

The second reason provided by the plurality for overturning the mandatory death sentence statute was "its failure to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentencing."[321] North Carolina had contended that because its mandatory death sentence statute eliminated all the sentencing discretion of the jury in a capital case, it had complied with *Furman's* mandate.[322] After reflecting upon the frequent occurrence of jury nullification in mandatory death sentence cases, however, the plurality rejected this contention.[323] The plurality reasoned that when jurors, deterred by the severity of the sentence automatically imposed, refused to convict an otherwise guilty defendant, they were exercising, in essence, unguided and unchecked discretion regarding who should be sentenced to death.[324] The imposition of the death penalty then rested "on the particular jury's willingness to act lawlessly."[325] The plurality observed that no standards had been provided by the state's mandatory death penalty statute "to guide the jury to its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die."[326] Furthermore, no means had been provided under the law to enable "the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences."[327] As a consequence, the

plurality of the Court found that North Carolina's mandatory death penalty statute did not "fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."[328]

The third and final reason given by the plurality for rejecting the mandatory death sentence statute was "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[329] The plurality stated its position on this matter with unmistakable clarity: "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[330]

In *Roberts (Stanislaus) v. Louisiana*, a case decided by a plurality opinion on the same day as *Gregg* and *Woodson*, the Supreme Court considered the constitutionality of another mandatory death penalty statute, this one promulgated by the state of Louisiana.[331] The defendant in the case had been convicted of first-degree murder committed in the perpetration of a robbery, and he was automatically sentenced under Louisiana law to death.[332] Although Louisiana had adopted "a different and somewhat narrower definition of first-degree murder than North Carolina,"

the Court found that this difference was "not of controlling constitutional significance."[333] The Court rejected the imposition of the mandatory death sentence under Louisiana law as a violation of the cruel and unusual punishment clause, and in so doing, it reiterated the three reasons it had earlier expressed in *Woodson*.[334]

First, the mandatory punishment violated the evolving standards of decency: "The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute."[335] Second, the mandatory sentence "plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate": "[T]here are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences, and there is no meaningful appellate review of the jury's decision."[336] Lastly, the mandatory sentence failed to provide a "meaningful opportunity for consideration of mitigating factors": "The constitutional vice of mandatory death sentence statutes -- lack of focus on the circumstances of the particular offense and the character and propensities of the offender -- is not resolved by Louisiana's limitation of first-degree murder to various categories of killings."[337]

The constitutionality of the Louisiana mandatory death penalty statute for first-degree murder was reconsidered a year later by the Supreme Court in *Roberts*

(Harry) v. Louisiana.[338] The specific issue in the case was whether a mandatory death sentence could be imposed for the first-degree murder of a police officer engaged in the performance of his lawful duties.[339] Relying on its holding in *Roberts (Stanislaus)*, the Court, in a *per curiam* opinion, held that the death sentence violated the cruel and unusual punishment clause of the eighth amendment.[340] The Court stated that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense."[341] This concept applied even in the case of a first-degree murder of an on-duty policeman:

> To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer.[342]

As a result of Louisiana's mandatory death sentence statute failing to allow "for consideration of particularized mitigating factors," the Court found it unconstitutional.[343]

When the Supreme Court in *Gregg* held that the imposition of the death penalty for deliberate murder was constitutional, the plurality of the Court specifically elected not to address "the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life -- for example, when

capital punishment is imposed for rape, kidnaping, or armed robbery that does not result in the death of any human being."[344] In 1977, the Court, in *Coker v. Georgia*, considered the constitutionality of a death sentence imposed for the rape of an adult woman.[345] Again, the case was decided by a plurality opinion.[346] The plurality of the Court applied a two part test derived from its previous decision in *Gregg* to determine if the death penalty under such circumstances was cruel and unusual punishment.[347] Under this test, "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[348] Failure of either test renders a punishment unconstitutional.[349] Applying the test to the punishment of death imposed for rape of an adult woman, the plurality of the Court found that the punishment failed the second prong of the test by being grossly disproportionate to the crime.[350]

In making this finding, the plurality looked at historical evidence, legislative enactments, and jury determinations. Of history, the plurality commented that "[a]t no time in the last 50 years has a majority of the States authorized death as a punishment for rape."[351] Of legislative enactments, the plurality observed that only one state, Georgia, at the time the case was decided, authorized a death sentence for the rape of an adult woman.[352] Of jury determinations, the plurality asserted

that "in the vast majority of [rape] cases, at least 9 out of 10, juries have not imposed the death sentence."[353] To these factors, the plurality added its own judgment that death is a disproportionate punishment for the crime of raping an adult woman and thus unconstitutional:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life....We have the abiding conviction that the death penalty...is an excessive penalty for the rapist who, as such, does not take human life.[354]

The next major Supreme Court case to consider the death penalty was *Lockett v. Ohio*, decided in 1978.[355] At issue in *Lockett* was an Ohio death penalty statute that required the trial judge to impose a death sentence for the offense of aggravated murder under aggravated circumstances unless he found the existence of one of three specified mitigating factors.[356] As interpreted by Ohio's highest court, this statute limited the factors to be considered in mitigation of the defendant's sentence to those three specified.[357] In a plurality opinion, Chief Justice Burger decided that by limiting the range of mitigating factors to be considered by the sentencer, the Ohio statute violated the eighth and fourteenth amendments to the Constitution:[358]

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis

for a sentence less than death.[359]

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.[360]
>
> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.[361]

From these statements, the plurality of the Court in *Lockett* made it clear that in order to meet the demands of the Constitution, "a death penalty statute must not preclude consideration of relevant mitigating factors."[362]

In 1982, in the case of *Eddings v. Oklahoma*, the Supreme Court further defined the *Lockett* rule concerning mitigation evidence in death penalty cases.[363] In *Eddings*, a 16-year-old defendant was convicted of the first-degree murder of a policeman.[364] At the sentencing hearing, evidence was presented by the defense to show the defendant's troubled and violent family upbringing and his general emotional disturbance.[365] In imposing the death penalty, the trial judge refused, as a matter of law, to consider this mitigation evidence.[366] The Supreme Court held that by placing limits on the mitigation evidence he would consider, the trial judge violated the *Lockett* rule: "Just as the State may not by statute

preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."[367]

In *Enmund v. Florida*, the Supreme Court, much as it did in *Coker*, considered whether the death penalty was a constitutionally valid punishment in a case where the defendant "neither took life, attempted to take life, nor intended to take life."[368] Whereas in *Coker* the offense in issue was rape, the offense in *Enmund* was felony murder.[369] The facts in *Enmund* showed that the defendant was sentenced to death under Florida's felony murder statute for being the driver of the getaway car in an armed robbery that ended in two murders.[370] The defendant did not kill, attempt to kill, or intend to participate in or facilitate a murder.[371] The Court stated that "the record supported no more than the inference that [the defendant] was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape."[372] In view of these circumstances, the Court held that the imposition of the death penalty was disproportionate to the offense committed and thus violated the cruel and unusual punishment clause.[373]

To support its holding, the Court looked to legislative enactments and jury determinations in the area of felony murder and its own judgment. The Court found first that only a small percentage of states had laws that allowed the death sentence "to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed."[374] Next, it found "overwhelming" evidence that American

juries had "rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder...."[375]

In voicing its own judgment, the Court said: "[W]e have the abiding conviction that the death penalty...is an excessive penalty for the robber who, as such, does not take human life."[376] The Court was not convinced that either of the two principal social purposes served by the death penalty, retribution and deterrence of capital crimes, would be advanced by imposing the death penalty on someone who did not kill or intend to kill.[377] Relying on its own judgment and those of the legislatures and juries, the Court concluded that the eighth amendment did not permit the imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[378]

Five years after the *Enmund* decision, the Supreme Court in *Tison v. Arizona* considered once again the imposition of the death penalty in a felony murder case.[379] Before framing the issue in *Tison*, the Court restated the holding of *Enmund* in terms that established the outer boundaries of that decision:

> *Enmund* explicitly dealt with two distinct subsets of all felony murders in assessing whether Enmund's sentence was disproportional under the Eighth Amendment. At one pole was Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state. Only a small minority

> of States even authorized the death penalty in such circumstances and even within those jurisdictions the death penalty was almost never exacted for such a crime. The Court held that capital punishment was disproportional in these cases. *Enmund* also clearly dealt with the other polar case: the felony murderer who actually killed, attempted to kill, or intended to kill. The Court clearly held that the equally small minority of jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted.[380]

In *Tison*, the defendants had been convicted of felony murder and sentenced to death, but their cases did not fall within either distinct subset of felony murder discussed in *Enmund*; their cases fell in between the *Enmund* poles.[381] The facts in *Tison* indicated that the defendants had not evidenced an intent to kill, but that they had been major actors in a felony in which each knew death was likely to occur.[382] The Court defined the issue in the case as "whether the Eighth Amendment prohibits the death penalty in the intermediate case of a defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life."[383]

To resolve this issue, the Court first examined state felony murder laws and state judicial decisions after *Enmund*.[384] This examination revealed that a substantial number of state legislative enactments and state court opinions had authorized the death penalty for the crime of felony murder, even in the absence of an intent to kill, where the defendant's participation in the felony was major and the likelihood of a murder

occurring during the felony was high.[385] The Court then determined that "reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death" represented the "highly culpable mental state" necessary to support a capital sentencing judgment.[386] Considering all of these factors, the Court concluded that the cruel and unusual punishment clause did not prohibit the imposition of the death penalty as disproportionate in the case of a felony murder conviction of a defendant whose participation in the felony committed was major and whose mental state was one of reckless indifference to human life.[387]

When the Supreme Court rendered its decision in *Woodson*, invalidating a first-degree murder mandatory death penalty statute, the plurality of the Court, in a footnote, specifically expressed no opinion regarding the constitutionality of "a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender."[388] When the Court in *Roberts (Harry)* invalidated a mandatory death sentence imposed for the first-degree murder of a policeman, the Court, in another footnote, "reserve[d] again the question whether and in what circumstances mandatory death sentence statutes may be constitutionally applied to prisoners serving life sentences."[389] One more time, in *Lockett v. Ohio*, the plurality of the Court, in yet another footnote, specifically "express[ed] no opinion as to whether the need to deter certain kinds of homicide would justify a

mandatory death sentence as, for example, when a prisoner--or escapee--under a life sentence is found guilty of murder."[390] Finally, in 1987, in the case of *Sumner v. Shuman*, the Court confronted the issue.[391]

The defendant in *Sumner v. Shuman* was a prison inmate in Nevada who had been sentenced to life imprisonment without the possibility of parole for first-degree murder.[392] While serving his sentence, he killed another prisoner and was convicted of capital murder.[393] Under Nevada law, proof of two elements established capital murder: "(1) that [the defendant] had been convicted of murder while in prison and (2) that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without the possibility of parole."[394] Once convicted, the defendant, by operation of law, was automatically sentenced to death; no individualized sentencing procedure was conducted.[395] Conviction "precluded a determination whether any relevant mitigating circumstances justified imposing on him a sentence less than death."[396] The Supreme Court appraised this mandatory death sentence and found that it violated the cruel and unusual punishment clause of the eighth amendment.[397]

In rejecting the mandatory death sentence, the Court pointed to three factors.[398] First, the Court declared that the mandatory sentencing statute failed to provide the individualized sentencing consideration necessary to a capital case.[399] The Court reasoned that the "two elements of capital murder [did] not provide an adequate

basis on which to determine whether a death sentence is the appropriate sanction in any particular case."[400] Quoting *Gregg*, the Court stated that the principal opinions in that case, *Woodson*, and *Roberts (Stanislaus)* established that in capital cases, "it is *constitutionally* required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence."[401] Then, quoting *Lockett*, the Court asserted that in death penalty cases, a sentencing authority must be allowed to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense."[402] In the case of a life-term inmate convicted of murder, the Court identified several possible mitigating circumstances that could be considered, such as the nature of the life-term offense, the facts surrounding the murder, the defendant's character, his age and his moral culpability.[403] Because none of these factors could be presented to the sentencer under Nevada's mandatory sentencing law, the Court felt compelled to invalidate it: "Although a sentencing authority may decide that a sanction less than death is not appropriate in a particular case, the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence."[404]

Second, the Court determined that a mandatory death sentence for a life-term inmate who commits murder was

"not necessary as a deterrent" or "justified because of the State's retribution interest."[405] The Court emphasized that both deterrence and retribution are equally well served by a non-mandatory guided-discretion capital statute as they are by a mandatory one: "[A] life-term inmate does not evade the imposition of the death sentence if the sentencing authority reaches the conclusion, after individualized consideration, that the inmate merits execution by the State."[406]

Finally, in a footnote, the Court contended that invalidating the mandatory sentencing statute would eliminate the problem of possible jury nullification:

> If a jury does not believe that a defendant merits the death sentence and it knows that such a sentence will automatically result if it convicts the defendant of the murder charge, the jury may disregard its instructions in determining guilt and render a verdict of acquittal or of guilty of only a lesser included offense. The situation presented by a life-term inmate may present another jury nullification problem if the jury believes that the only manner of punishing a life-term inmate would be execution. In such circumstances undeserved convictions for capital murder could result. Although the jury may believe that the defendant is guilty only of manslaughter, it might still convict of the greater offense because the jurors believe there is no other means of punishment. The guided-discretion statutes that we have upheld, as well as the current Nevada statute, provide for bifurcated trials in capital cases to avoid nullification problems. Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other.[407]

In conclusion, *Sumner v. Shuman* stands for the

proposition that the Supreme Court will insist on individualized sentencing in a capital case.[408] An exception will not be permitted even in the case of a life-term inmate, with no possibility of parole, who has committed murder.[409]

B. COURT OF MILITARY APPEALS PRECEDENT

Although the Court of Military Appeals has never decided a death penalty case under the 1984 Manual for Courts-Martial, in *United States v. Matthews*, a pre-1984 Manual death penalty case, the court held that Supreme Court capital sentencing precedents are applicable to the military justice system unless there is a military necessity for a distinction.[410] The court phrased its position in these terms:

> Since a servicemember is entitled both by [Article 55] and under the Eighth Amendment to protection against "cruel and unusual punishments," we shall seek guidance from Supreme Court precedent as to the significance of this protection in capital cases. However, we recognize that, since in many ways the military community is unique, there may be circumstances under which the rules governing capital punishment of servicemembers will differ from those applicable to civilians. This possibility is especially great with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war, e.g. spying.[411]

According to the Court of Military Appeals, then, the sentencing standards established by the Supreme Court for capital cases must be followed in all courts-martial,

except those in which a specific military reason, such as combat conditions or war, warrants the applicability of other, perhaps lower, standards.[412] In the normal capital case, the Court of Military Appeals follows Supreme Court guidance and requires that "the sentence must be individualized as to the defendant, and the sentencing authority must detail specific factors that support the imposition of the death penalty in the particular case."[413] As discussed earlier, these requirements have been instituted in the 1984 Manual for Courts-Martial for all capital offenses, except spying.

IV. CURRENT INTERNATIONAL LAW

Prior to applying the judicial precedent to the mandatory death sentence for spying under Article 106, UCMJ, it is necessary first to examine the international arena to determine what punishment is appropriate for spying. International law commentators since Bluntschli in the late 1800's have generally agreed that while death usually is an authorized punishment for spying, it certainly is not a mandatory one.[414] In the opinion of Bluntschli, death should be resorted to as a punishment for spying only "as an extreme measure in the most aggravated case."[415] He believed that in the modern age, spying "is treated more leniently, and a milder punishment, generally imprisonment, is now imposed."[416] Oppenheim's *International Law* expresses the same thought, but in much simpler terms: "The usual punishment for spying is hanging or shooting; though less severe

punishments are, of course, admissible, and are sometimes inflicted."[417] *Wheaton's International Law* echoes the identical sentiment: "A person found guilty of espionage may be hanged or shot; but smaller punishments are sometimes imposed."[418] Also, Lauterpacht, writing in the *British Yearbook of International Law*, has called for the "humanization of the law relating to the punishment of spies."[419] And, Stone, in his treatise on *Legal Controls of International Conflict* writes of the need to mitigate the harshness of the death penalty for spying, and he accepts "Bluntschli's eloquent plea that the death penalty for spies should be limited only to the graver cases."[420]

Lawrence, in his treatise *The Principles of International Law*, best summarizes the modern international view on the punishment for spying by distinguishing, as did Winthrop, between the honorable and the dishonorable spy and the punishment each warranted:

> The customary law on the subject of spies allows commanders to use them, and to evoke the services they render by the promise of rewards. But too often the taint of personal dishonor is held to attach itself to them indiscriminately, whereas in reality they differ from one another as coal from diamonds....Considerations such as ['disdaining rewards,' 'disregarding danger,' and acting from a 'pure spirit of patriotism'] should serve to mitigate the harsh judgments sometimes pronounced on spies as a class, as if they were all alike. It is impossible to arrive at any reasoned conclusions unless we distinguish...between those who carry devotion and patriotism to the point of risking their lives in cold blood and without any of the

> excitement of combat, in order to obtain within the enemy's lines information of the utmost importance to their country's cause, and those who betray the secrets of their own side for the sake of a reward from its foes. The first are heroes, the second are traitors; and it is the height of injustice to visit both with the same condemnation. Military reasons demand that the right to execute spies, if caught, should exist; but unless considerations of safety imperatively demand the infliction of the last penalty, a general should commute it into imprisonment.[421]

In addition to the opinions of commentators, reference to the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* also supports the view that the death penalty is not mandatory for spying.[422] Article 68 of that convention contains the only mention of punishment for spying in any of the four Geneva Conventions or, for that matter, in any modern international agreement.[423] Paragraph 2 of Article 68 provides:

> The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.[424]

What this paragraph means is that "an occupying power may not sentence a [civilian] to death for espionage, unless such an offense were punishable by death under the law of the occupied territory in force before the occupation

began."[425] More importantly, however, the paragraph strongly implies that not only is death not required as a mandatory punishment for spying under international law, but in certain jurisdictions, it is not even a capital offense. Not surprisingly, this paragraph was unacceptable to the United States, and in ratifying the convention, it made the following reservation to the paragraph: "The United States reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins."[426] Despite the U.S. reservation, the acceptance of the paragraph by the vast majority of signatories to the convention affords the paragraph international law status.[427] Thus, from this treaty provision and the consensus of international law commentators, it appears clear that the death penalty for spying, although generally authorized, should in no sense be considered mandatory.

V. APPLICATION OF SUPREME COURT PRECEDENT

The first question to be answered from Supreme Court precedent is whether the offense of spying warrants capital punishment.[428] To determine if a punishment is disproportionate to an offense committed and hence a violation of the cruel and unusual punishment clause, the Supreme Court's method of analysis employed in *Gregg*, *Coker*, *Enmund*, and *Tison* must be applied.[429] First, under

contemporary standards of decency, is the punishment of death considered an inappropriate sanction for the crime of spying?[430] The answer to that question is an unequivocal no. International law has authorized the imposition of the death penalty for spying since that law was initially codified,[431] and the U.S. Congress has authorized the death penalty for spying since 1776.[432] Second, does the punishment of death fail to make a measurable contribution to the acceptable goals of punishment?[433] No. Both the goals of deterrence and retribution are applicable to support the death penalty for spying. The death sentence will surely give a potential spy pause to consider his actions prior to volunteering for such a mission, and death is considered an appropriate reward for a spy who betrays his own country. Finally, is the death penalty grossly out of proportion to the severity of the offense?[434] Again, the response is no. Since the end result of spying may be the loss of a battle, an army, or a war, the consequences of the offense certainly warrant an extreme punishment such as death. By finding a negative response to all of these three questions, the Supreme Court would hold that the death sentence for spying is constitutional and not a violation of the cruel and unusual punishment clause of the eighth amendment.

The second question to answer from Supreme Court precedent is whether a mandatory death sentence upon conviction of the offense of spying is permissible.[435] Based on the cases of *Woodson*, *Roberts (Stanislaus)*, *Roberts (Harry)*, *Lockett*, *Eddings*, and *Sumner*, the answer

to this question is certain: the mandatory death sentence is unconstitutional. First, the Supreme Court has determined that mandatory death penalty statutes conflict with contemporary standards of decency.[436] Second, the Court has held that as a consequence of jury nullification in mandatory death cases, juries have exercised unguided and unchecked discretion regarding who should be sentenced to death.[437] Such arbitrary and wanton jury discretion fails the basic *Furman* requirement that there be objective standards to guide the jury in a capital sentencing decision. Third, the Court has rejected mandatory death sentence statutes because they fail to allow the sentencer to consider the relevant aspects of the character and record of the offender and the circumstances of the offense prior to imposing the death penalty.[438] The defense must be given an opportunity to present all relevant mitigating factors to the sentencer, and the sentencer must consider them in deciding on an appropriate punishment.[439] Finally, the Court has held that mandatory death sentences are not necessary as a deterrent or justified because of a retribution interest.[440] The Court reasoned that deterrence and retribution are equally well served by a non-mandatory guided-discretion capital statute as by a mandatory one.[441] The death penalty can be awarded under either type of statute.

Thus, the Court has written in fairly unmistakable language that mandatory death sentence statutes are unconstitutional. And, as long as a judicial proceeding is required to determine guilt before punishment is

imposed, no reason of military necessity can save the mandatory death sentence under Article 106, UCMJ. To paraphrase the Court in *Sumner v. Shuman*, even under a non-mandatory sentencing statute, a spy will not be able to evade the imposition of the death sentence if the sentencing authority reaches the conclusion, after individualized consideration, that he merits execution.

As noted earlier, the analysis to the 1984 Manual for Courts-Martial cites three reasons for treating the offense of spying differently on sentencing from other capital offenses.[442] None of these reasons, however, affect the conclusion that the mandatory death penalty provision is unconstitutional.

The first reason given in the analysis is that Congress recognized that no separate sentencing determination was required for the offense of spying.[443] Yet, despite this Congressional recognition, the President, in promulgating the 1984 Manual, rejected it by requiring a separate sentencing hearing for every capital offense, to include spying.[444] Also, as previously discussed, it is not entirely clear that Congress actually intended the absence of a separate sentencing hearing for the offense of spying.[445] By providing in Article 52(b)(1), UCMJ, that "[n]o person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial," Congress seems to imply that a sentencing proceeding should be conducted even for the offense of spying.[446]

The second reason given in the analysis is that the Supreme Court has not held that a mandatory death penalty

is unconstitutional for all offenses.[447] In support of this reason, the analysis references the Supreme Court case of *Roberts (Harry)* and the Supreme Court's reservation in that case of the question whether a mandatory death sentence may be constitutionally imposed for a murder committed by a prisoner serving a life sentence.[448] With the recent opinion of the Court in *Sumner v. Shuman* resolving this issue against the mandatory death penalty, the authority supporting the second reason has vanished.[449] The reasoning of the Court in that case strongly suggests that a mandatory death penalty for any offense is unconstitutional.[450]

The final reason given in the analysis is that the death penalty has been the only penalty for spying in wartime since 1806.[451] This reason is not substantiated by the facts. As noted in the earlier discussion of the historical background of the offense of spying, the spy offense set out from 1862 to 1950 in the Articles for the Government of the Navy of the United States did not mandate a death sentence.[452] Instead, the Navy spy offense gave a court-martial the option to award death or "such other punishment" as it deemed appropriate.[453] In addition, as previously discussed, international law commentators since the late 1800's have agreed that although the imposition of the death penalty for spying was authorized, less severe punishments were permitted.[454]

None of the reasons cited by the analysis support making an exception to the Supreme Court precedent against mandatory death penalty statutes. And, in view of the reasoning of the Supreme Court in *Sumner v.*

Shuman, no military necessity will authorize a mandatory death sentence. Consequently, the verdict on the mandatory death penalty provision of Article 106, UCMJ, may be announced in one word: unconstitutional.

VI. CONCLUSION

Shortly after volunteering for his mission of spying on the British, Captain Nathan Hale discussed his decision with a fellow officer and friend, Captain William Hull.[455] In his memoirs, Captain Hull wrote of his final meeting with Captain Hale in terms that express the feeling of the time for the act of spying:

> He asked my candid opinion. I replied that it was an act which involved serious consequences, and the propriety of it was doubtful; and though *he* viewed the business of a spy as a duty, yet he could not be officially be required to perform it; that such a service was not claimed of the meanest soldier, though many might be willing, for a pecuniary compensation, to engage in it; and as for himself, the employment was not in keeping with his character. His nature was too frank and open for deceit and disguise, and he was incapable of acting a part equally foreign to his feelings and habits. Admitting that he was successful, who would wish success at such a price? Did his country demand the moral degradation of her sons, to advance her interests?
>
> Stratagems are resorted to in war; they are feints and evasions, performed under no disguise; are familiar to commanders; form a part of their plans, and considered in a military view, lawful and advantageous. The fact with which they are executed exacts admiration from the enemy. But who respects the character of a spy, assuming the garb of

> friendship but to betray? The very death assigned him is expressive of the estimation in which he is held. As soldiers, let us do our duty in the field; contend for our legitimate rights, and not stain our honor by the sacrifice of integrity. And when present events, with all their deep and exciting interests, shall have passed away, may the blush of shame never arise, by the remembrance of an unworthy though successful act, in the performance of which we were deceived by the belief that it was sanctioned by its object. I ended by saying that, should he undertake the enterprise, his short, bright career would close with an ignominious death.[456]

Captain Hull's final words were prophetic for Captain Nathan Hale. He died an ignominious death at the hands of his enemies. Under current military law, Captain Hale would face a similar fate if he were convicted of spying under Article 106, UCMJ -- mandatory death.

In light of recent U.S. Supreme Court decisions rejecting mandatory capital punishment, however, the mandatory death provision in Article 106 is certainly unconstitutional. As such, Article 106, UCMJ, should be rewritten to change the phrase "shall be punished by death" to either "shall be punished by death or imprisonment for life as a court-martial may direct" or "shall be punished by death or such other punishment as a court-martial shall direct." The 1984 Manual for Courts-Martial should then be revised to include the offense of spying within the capital sentencing procedures currently in effect for all other capital offenses under the UCMJ. This would require the members to hear all the mitigating evidence offered by the defense at a sentencing hearing, to actually vote on

sentence, and to find the existence of a specified aggravating factor prior to imposing the death sentence.

In the case of Captain Nathan Hale, the members of a court-martial would undoubtedly hear of his good character, and they would see him as a patriotic brother-in-arms, not as a mercenary soldier or a traitor to his country. As a result, the members may vote that life imprisonment is a more appropriate sentence than death. Assuming that Captain Hale's counterpart, Major Andre, is also imprisoned for life, a prisoner exchange could later be arranged by the opposing countries. Captain Hale and Major Andre would then return home as living, honored heroes, not as honored remains in a body bag.

The aforementioned scenario is not so farfetched. A recent, similar situation was described in the *Congressional Record* as follows:

> In 1962, the United States swapped a KGB colonel, Rudolph Abel, for Francis Gary Powers, a U-2 pilot who worked for the CIA. William Donovan, Abel's defense attorney, argued during his trial that Abel should not be sentenced to death because it might be possible to swap Abel for an American later. Donovan told the sentencing judge that "....it is possible that in the foreseeable future an American of equivalent rank will be captured by Soviet Russia or an ally; at such time an exchange of prisoners through diplomatic channels could be considered to be in the best interest of the United States." Donovan proved to be right. Because the judge did not sentence Abel to death, the United States was able to trade him for Gary Powers 5 years later.[457]

Thus, in today's world, Captain Hale and Major Andre would live.

FOOTNOTES

1. B. Newman, Epics of Espionage 7 (1951).

2. *Id.*

3. *See* I. Stuart, Life of Captain Nathan Hale: The Martyr-Spy of the American Revolution (Hartford 1856); H. Halleck, International Law; or, Rules Regulating the Intercourse of States in Peace and War 407 (New York 1861); ; H. Johnston, Nathan Hale, 1776: Biography and Memorials (1901); J. Root, Nathan Hale (1915); J. Darrow, Nathan Hale: A Story of Loyalties (1932); M. Pennypacker, George Washington's Spies on Long Island and in New York (1939); 2 L. Oppenheim, International Law 425 (7th ed. 1952).

4. *The Beginnings: Halleck on Military Tribunals*, Mil. L. Rev. Bicent. Issue 13 (1975).

5. H. Halleck, *supra* note 3, at 407.

6. *See* Proceedings of a Board of General Officers, Held by Order of His Excellency Gen. Washington, Commander in Chief of the Army of the United States of America, Respecting Major John Andre, Adjutant General of the British Army (Philadelphia 1780); E. Benson, Vindication of the Captors of Major Andre (New York 1817); H. Halleck, *supra* note 3, at 408-09; W. Sargent, The Life of Major Andre, Adjutant-General of the British Army in America (1871); Halleck, *Military Espionage*, 5 Am. J. Int'l L. 590, 594-603 (1911); 2 H. Wheaton, Wheaton's

International Law 219-20 (7th ed. 1944) (1st ed. 1836); 2 L. Oppenheim, *supra* note 3, at 423-24; R. Hatch, Major John Andre: A Gallant in Spy's Clothing (1986).

7. 2 H. Wheaton, *supra* note 6, at 219.

8. *See* H. Johnson, *supra* note 3, at 126; J. Root, *supra* note 3, at 86; J. Darrow, *supra* note 3, at 214; I. Stuart, *supra* note 3, at 134.

9. 1 H. Halleck, Halleck's International Law 630 (4th ed. 1908) (1st ed. 1861).

10. J. Root, *supra* note 3, at 152-60.

11. H. Halleck, *supra* note 3, at 407-09; W. Winthrop, Military Law and Precedents 765-66, 770-71 (2d ed. 1920 reprint).

12. Gen. Orders No. 100, War Dep't (24 Apr. 1863).

13. H. Halleck, *supra* note 3, at 407-09; W. Winthrop, *supra* note 11, at 765-66, 770-71.

14. *See* H. Halleck, *supra* note 6, at 590; Ex parte Quirin, 317 U.S. 1, 42 n.14 (1942); Dep't of Army, Pam. 27-161-2, International Law, Volume II, at 59 (23 Oct. 1962) [hereinafter DA Pam. 27-161-2].

15. C. MacDonald, A Time for Trumpets 226 (1985); Koessler, *International Law on Use of Enemy Uniforms as a Stratagem and the Acquittal in the Skorzeny Case*, 24 Mo. L. Rev. 16, 29-30 (1959).

16. Uniform Code of Military Justice art. 106, 10 U.S.C. § 906 (1982) [hereinafter UCMJ].

17. *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 921(c)(2)(A) discussion [hereinafter R.C.M. 921(c)(2)(A) discussion].

18. W. Winthrop, *supra* note 11, at 765; Ex Parte Quirin 317 U.S. 1, 41 (1942).

19. Resolution quoted in W. Winthrop, *supra* note 11, at 765 and cited at 765 n. 88 as 1 Jour. Cong. 450.

20. W. Winthrop, *supra* note 11, at 766; *see also* I. Maltby, A Treatise on Courts-Martial and Military Law 35-36 (Boston 1813); Gen. Orders No. 39, HQ, Dep't of the Mo. (23 May 1863).

21. W. Winthrop, *supra* note 11, at 766.

22. Act of April 10, 1806, ch. 20, § 2, 2 Stat. 371 (1806); *see also* I. Maltby, *supra* note 3, at 199-200; W. Winthrop, *supra* note 11, at 766.

23. Act of April 10, 1806, ch. 20, § 2, 2 Stat. 371 (1806).

24. W. Winthrop, *supra* note 11, at 766.

25. *Id.*

26. *Id.*

27. W. Winthrop, *supra* note 11, at 766; Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862).

28. Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862).

29. Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862); *see* W. Winthrop, *supra* note 11, at 766.

30. W. Winthrop, *supra* note 11, at 766.

31. Act. of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862).

32. *Id.*

33. Act of March 3, 1863, ch. 75, § 38, 12 Stat. 736 (1863).

34. *Id.*

35. Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862); Act of March 3, 1863, Ch. 75, § 38, 12 Stat. 737 (1863).

36. Rev. Stat. (2d ed. 1878).

37. Rev. Stat. § 1343 (2d ed. 1878).

38. *Id.*

39. Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862).

40. Act of July 17, 1862, ch. 204, art. 4, 12 Stat. 602 (1862).

41. *See* W. Winthrop, *supra* note 11, at 765.

42. *See* Act of Feb. 13, 1862, ch. 25, § 2, 12 Stat. 340 (1862).

43. *See* 50 U.S.C. § 700 (1952).

44. Rev. Stat. § 1624 (2d ed. 1878).

45. 34 U.S.C. § 1200 (1940).

46. *Id.*

47. Act of June 4, 1920, ch. 227, 41 Stat. 804 (1920).

48. *Compare* Rev. Stat. § 1343 (2d ed. 1878) *with* Act of June 4, 1920, ch. 227, 41 Stat. 804 (1920).

49. 10 U.S.C. § 1554 (1940).

50. Act of June 4, 1920, ch. 227, 41 Stat. 804 (1920).

51. Act of May 5, 1950, ch. 169, 64 Stat. 107 (1950).

52. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1229 (1949) [hereinafter *Hearings*].

53. *Id.*

54. *Id.*

55. 50 U.S.C. § 700 (1952).

56. *Hearings*, *supra* note 52, at 695-96 (statement of John J. Finn, Judge Advocate, District of Columbia Department of the American Legion); *id.* at 844 (statement of Arthur J. Keefe, Professor, Cornell Law School); H.R. Rep. No. 491, 81st Cong., 1st Sess. 126-27 (1949).

57. Act of Aug. 10, 1956, ch. 1041, 70A Stat. 71 (1956).

58. 10 U.S.C. § 906 (1982).

59. *See* 10 U.S.C.S. § 906 (Law. Co-op. 1985).

60. W. Winthrop, *supra* note 11, at 765-66.

61. Act of July 17, 1962, ch. 204, 12 Stat. 602 (1862); Rev. Stat. § 1624 (2d ed. 1878); 34 U.S.C. § 1200 (1940).

62. Act of April 10, 1806, ch. 20, § 2, 2 Stat. 371 (1806); Act of Feb. 13, 1862, ch. 25, § 4, 2 Stat. 340 (1862); Act of March 3, 1863, Ch. 75 § 38, 12 Stat. 736 (1863); Rev. Stat. § 1343 (2d ed. 1878); Act of June 4, 1920, ch. 227, 41 Stat. 804 (1920); 10 U.S.C. § 1554 (1940).

63. Gen. Orders No. 100, War Dep't (24 Apr. 1863); Garner, *General Order 100 Revisited*, 27 Mil. L. Rev. 1 (1965); Root, *Francis Lieber*, 7 Am. J. Int'l L. 453 (1913).

64. Gen. Orders No. 100, War Dep't (24 Apr. 1863);

Garner, *supra* note 63, at 1-5, 12-14; Root, *supra* note 63, at 453-58.

65. Gen. Orders No. 100, paras. 83, 88, 103-04, War Dep't (24 Apr. 1863).

66. Garner, *supra* note 63, at 4. *See also* E. Vattel, The Law of Nations (J. Chitty ed. 1883) (1st ed. 1758); H. Halleck, *supra* note 3.

67. E. Vattel, *supra* note 66.

68. *See* H. Halleck, *supra* note 3, at 406-07; 2 L. Oppenheim, *supra* note 3, at 421.

69. E. Vattel, *supra* note 66, at 375.

70. W. Winthrop, *supra* note 11, at 767.

71. *Id.*

72. *Id.*

73. *See* Kane, Spies for the Blue and Gray 11-16 (1954).

74. *See* Act of March 3, 1863, ch. 75, § 38, 12 Stat. 736 (1863).

75. Root, *supra* note 63, at 457-58. Bluntschli is quoted by Root at 458 as saying: "These instructions prepared by Lieber, prompted me to draw up, after his model, first, the laws of war, and then, in general, the law of nations, in the form of a code, or law book, which

should express the present state of the legal consciousness of civilized peoples."

76. J. Bluntschli, Code of International Law 78-79 (G. Lieber trans. n.d.) (Translation located in rare book room of TJAGSA library, Charlottesville, Va.).

77. *Id.*

78. *Id.*

79. Root, *supra* note 63, at 457; Garner, *supra* note 63, at 2.

80. Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex thereto Embodying Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention No. IV].

81. *Id.*

82. *Id.* annex arts. 24, 29-31, 36 Stat. 2277, 2302-04. *See also* Dep't of Army, Pam. 27-1, Treaties Governing Land Warfare, at 8, 13-14 (7 Dec. 1956) [hereinafter DA Pam. 27-1].

83. *See* Garner, *supra* note 63, at 12; DA Pam. 27-161-2, at 59; Dep't of Army, Field Manual 27-10, The Law of Land Warfare, para. 76 (18 Jul. 1956) [hereinafter FM 27-10].

84. Garner, *supra* note 63, at 12; DA Pam. 27-161-2, at 59.

85. Gen. Orders No. 100, para. 83, War Dep't (24 Apr. 1863); Hague Convention No. IV, annex art. 29, 36 Stat. 2277, 2303-04. *See* Garner, *supra* note 63, at 13.

86. Gen. Orders No. 100, para. 104, War Dep't (24 Apr. 1863); Hague Convention No. IV, annex art. 31, 36 Stat. 2277, 2304. *See* W. Winthrop, *supra* note 11, at 770; Garner, *supra* note 63, at 14.

87. Hague Convention No. IV, annex art. 24, 36 Stat. 2277, 2302.

88. Gen. Orders No. 100, para. 101, War Dep't (24 Apr. 1863).

89. FM 27-10, para. 77.

90. 2 H. Wheaton, *supra* note 6, at 218-19; DA Pam. 27-161-2, at 58.

91. Gen. Orders No. 100, para. 101, War Dep't (24 Apr. 1863).

92. DA Pam. 27-161-2, at 58.

93. Hague Convention No. IV, annex art. 30, 36 Stat. 2277, 2304.

94. Act of March 3, 1863, ch. 75, § 38, 12 Stat. 736 (1863).

95. *See* Kane, Spies for the Blue and Gray (1954); Garner, *supra* note 63, at 13.

96. Garner, *supra* note 63, at 13-14. *See also* W. Winthrop, *supra* note 11, at 770 ("It has always been legal...to proceed *summarily without trial* against spies....Modern codes, however, call for a trial of the offender.").

97. W. Winthrop, *supra* note 11.

98. *Id.* at 770 (Vattel and Lieber are cited as the references for Winthrop's statement at 770 n.29).

99. *Id.* at 771.

100. *Id.*

101. *Id.*

102. *Id.*

103. Manual for Courts-Martial, United States, 1984, Part IV, para. 30b(1)-(5) [hereinafter MCM, 1984].

104. *Id.* para. 30(b)(1)-(5).

105. Hague Convention No. IV, annex art. 29, 36 Stat. 2277, 2303-04.

106. UCMJ art. 106. *See* FM 27-10, para. 76. *See also* FM 27-10, para. 75c ("Insofar as Article 29, HR, and Article 106, Uniform Code of Military Justice, are not in conflict with each other, they will be construed and applied together. Otherwise Article 106 governs American practice.").

107. MCM, 1984, Part IV, para. 30b(5).

108. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 103 analysis, app. 21, at A21-5 [hereinafter R.C.M. 103 analysis].

109. *See* United States v. Bancroft, 11 C.M.R. 3 (C.M.A. 1953); United States v. Gann and Sommer, 11 C.M.R. 12 (C.M.A. 1953); United States v. Ayers, 15 C.M.R. 220; (C.M.A. 1954); United States v. Shell, 23 C.M.R. 110 (C.M.A. 1957); United States v. Anderson, 38 C.M.R. 386 (C.M.A. 1968); and United State v. Averette, 41 C.M.R. 363 (C.M.A. 1970). The phrase "time of war" is found in Articles 2(a)(10); 43(a),(e), and (f); 71(b); 85; 90; 101; 105; 106; and 113.

110. United States v. Shell, 23 C.M.R. 110, 114 (C.M.A. 1957).

111. United States v. Bancroft, 11 C.M.R. 3, 5 (C.M.A. 1953).

112. *Id.*

113. *Id.*

114. United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970).

115. *Id.*

116. United States v. Bancroft, 11 C.M.R. 3, 5 (C.M.A. 1953). *See also* United States v. Ayers, 15 C.M.R. 220,

222-24 (C.M.A. 1954); United States v. Taylor, 15 C.M.R. 232, 237 (C.M.A. 1954).

117. United States v. Bancroft, 11 C.M.R. 3, 7 (C.M.A. 1953).

118. United States v. Gann, 11 C.M.R. 12, 13 (C.M.A. 1953).

119. United States v. Shell, 23 C.M.R. 110, 114 (C.M.A. 1957).

120. United States v. Gann, 11 C.M.R. 12, 13 (C.M.A. 1953).

121. United States v. Shell, 23 C.M.R. 110, 114-15 (C.M.A. 1953). *But see* United States v. Ayers, 15 C.M.R. 220, 225-28 (for statute of limitation purposes of Article 43(a), time of war extends beyond the cessation of hostilities and continues until Congress formally proclaims it over for those purposes); United States v. Taylor 15 C.M.R. 232, 234-36 (for statute of limitation purposes of Article 43(f), time of war extends beyond the cease-fire and continues until Congress formally proclaims a termination of hostilities).

122. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 103(19) [hereinafter R.C.M.].

123. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-64 (1 May 1982) [hereinafter Benchbook].

124. *Id.*

125. United States v. Ayers, 15 C.M.R. 220, 227 (C.M.A. 1954).

126. R.C.M. 103 analysis at A21-5.

127. *Id.* at A21-6.

128. United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

129. *Id.*

130. *Id.* at 363-65.

131. *Id.* at 365.

132. *Id.*

133. *Id.*

134. *Id.*

135. UCMJ art. 106.

136. United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970).

137. MCM, 1984, Part IV, para. 30c(3).

138. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

139. *Id.* at 6-9.

140. *Id.* at 7-9.

141. *Id.* at 121-31.

142. *Id.* at 127.

143. *See* DA Pam. 27-161-2, at 61. *See also* FM 27-10, para. 76 ("It has not been decided whether the phrase "or elsewhere" justifies trial by a military tribunal of *any* person who is not found in one of the places designated or in the field of military operations or territory under martial law and is not a member of the armed forces or otherwise subject to the Uniform Code of Military Justice.").

144. 31 Op. Att'y Gen. 356 (1918).

145. *Id.* at 357-58.

146. *Id.* at 357.

147. *Id.* at 361.

148. *Id.* at 361-65.

149. 40 Op. Att'y Gen. 561 (1919).

150. *Id.*

151. United States ex rel. Wessels v. McDonald 265 F. 754 (E.D.N.Y. 1920), *appeal dismissed*, 256 U.S. 705 (1921).

152. *Id.* at 756-59.

153. *Id.* at 758-60.

154. *Id.* at 760.

155. *Id.* at 761-64.

156. *Id.* at 763-64.

157. *Id.*

158. Ex parte Quirin, 317 U.S. 1 (1942). The Supreme Court found it unnecessary to resolve the issue whether the alleged American citizen actually retained his American citizenship. *See id.* at 20.

159. *Id.* at 21.

160. *Id.*

161. *Id.* at 22-23.

162. *Id.* at 24.

163. *Id.* at 45.

164. *Id.* at 38.

165. *Id.*

166. *Id.* at 45-46. The Supreme Court in *Ex parte Quirin* appears to imply that spies are "offenders against the law of war." It has been suggested, however, that the Court "used the term 'offense' in the loose sense in which it is often used in connection with the law of war,

i.e., as an act which deprives a person of the privileged status he could claim as a prisoner of war." Dep't of Army, Pam. 27-161-2, at 58 n.72. *See also* Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 330-31 (1951). *But cf.* Hyde, *Aspects of the Saboteur Cases*, 37 Am. J. Int'l L. 88, 88-91 (1943).

167. Ex parte Quirin, 317 U.S. 1, 46 (1942).

168. *Id.* at 37-38.

169. Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).

170. *Id.* at 431-32.

171. *Id.* at 432.

172. *Id.* at 431.

173. *Id.* at 431-33.

174. *Id.* at 432.

175. *Id.* at 433.

176. *See id.* at 429-433.

177. DA Pam. 27-161-2, at 62.

178. UCMJ, art. 106; MCM, 1984, Part IV, para. 30b-c. The word "clandestinely" is defined in the Benchbook, para. 3-64, as meaning "in disguise, secretly, covertly,

or under concealment." The word "enemy" is defined in MCM, 1984, Part IV, para. 23c as follows: "'Enemy' includes organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. 'Enemy' is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other."

179. MCM, 1984, Part IV, para. 30c(4).

180. *Id.* para. 30c(5).

181. *Id.* *See* W. Winthrop, *supra* note 11, at 767 ("This presumption, however, might -- it was ruled -- be rebutted by evidence that the party had come within the lines for a comparatively innocent purpose -- as to visit his family; or, having been detained within the lines by being separated from his regiment, &c., on a retreat, had changed his dress merely to facilitate a return to the other side. In such a case indeed the clearest proof would properly be required before accepting the defense.").

182. MCM, 1984, Part IV, para. 30c(6).

183. *See* 2 L. Oppenheim, *supra* note 3, at 424-25; 2 H. Wheaton, *supra* note 6, at 220; DA Pam. 27-161-2, at 60.

184. *See* MCM, 1984, Part IV, para. 30 analysis, app. 21, at A21-92.

185. 2 L. Oppenheim, *supra* note 3, at 424-25; 2 H. Wheaton, *supra* note 6, at 220.

186. MCM, 1984, Part IV, para. 30 analysis, app. 21, at A21-92.

187. UCMJ art. 106.

188. *See* R.C.M. 921(c)(2)(A) discussion.

189. UCMJ art. 51(a); R.C.M. 921(c)(2)(A).

190. UCMJ arts. 18-20; R.C.M. 201(f)(2)(C)(i).

191. UCMJ arts. 16, 18; R.C.M. 501(a)(1)(A).

192. UCMJ art. 18; R.C.M. 201(f)(1)(C), 501(a)(1)(A)-(B).

193. UCMJ art. 45(b); R.C.M. 910(a)(1).

194. R.C.M. 1004(d).

195. R.C.M. 1001(a)-(c); *see also* Gaydos, *A Prosecutorial Guide to Court-Martial Sentencing*, 114 Mil. L. Rev. 1, 12-67 (1986).

196. R.C.M. 1001(d).

197. Gaydos, *supra*, at 58; *see* R.C.M. 1001(c)(3).

198. United States v. Matthews, 16 M.J. 354, 378 (C.M.A. 1983).

199. R.C.M. 1004(d).

200. R.C.M. 1004(d).

201. R.C.M. 1004(e).

202. *Id.*

203. UCMJ art. 58(a).

204. UCMJ art. 52(b)(1).

205. United States v. Shroeder, 27 M.J. 87, 89 (C.M.A. 1988).

206. *Id.*

207. UCMJ art. 57(a); R.C.M. 1113(b); *see* United States v. Matthews, 16 M.J. 354, 382 (C.M.A. 1983).

208. R.C.M. 1006(a), (d)(5).

209. UCMJ art. 118; *see generally* R.C.M. 1004.

210. R.C.M. 1006(d)(5).

211. United States v. Shroeder, 27 M.J. 87, 89 (C.M.A. 1989).

212. *Id.* at 90.

213. *Id.*

214. R.C.M. 1004(d) analysis, at A21-68.

215. UCMJ art. 54(a), (c)(1)(A); R.C.M. 1103(b)(2)(B)(i).

216. UCMJ art. 54(a); R.C.M. 1104(a)(2)(A).

217. UCMJ art. 54(d); R.C.M. 1104(b)(1)(A).

218. UCMJ art. 60(a); R.C.M. 1104(e).

219. UCMJ art. 60(d); R.C.M. 1104(e).

220. UCMJ art. 60(d); R.C.M. 1106(d).

221. UCMJ art. 60(a); R.C.M. 1106(f)(1).

222. UCMJ art. 60(d); R.C.M. 1106(d)(4).

223. R.C.M. 1105(b); *see* UCMJ art. 60(b).

224. UCMJ art. 60(c)(2)-(3); R.C.M. 1107(a).

225. R.C.M. 1107(b)(1).

226. R.C.M. 1107(a) discussion.

227. UCMJ art. 60(c)(3)(A); R.C.M. 1107(c)(2)(A).

228. R.C.M. 1107(c) discussion.

229. UCMJ art. 60(c)(2); R.C.M. 1107(d)(1), 1107(f)(1).

230. UCMJ art. 60(c)(2); R.C.M. 1107(d)(1).

231. UCMJ art. 60(c)(1)-(2); R.C.M. 1107(d)(1)-(2).

232. R.C.M. 1107(d)(2).

233. UCMJ art. 71(d); R.C.M. 1108(b).

234. UCMJ art. 71(a).

235. UCMJ art. 65; R.C.M. 1111(a)(1).

236. UCMJ art. 71(a); R.C.M. 1113(c)(3).

237. UCMJ art. 66(a)-(b); R.C.M. 1201(a)(1).

238. UCMJ art. 66(c); R.C.M. 1203(b) discussion.

239. UCMJ art. 67(b)(1); R.C.M. 1203(c)(3).

240. UCMJ art. 67(d); R.C.M. 1204(a)(1).

241. UCMJ art. 67(h)(1); R.C.M. 1205(a)(1).

242. U.S. Const. art. 111, sec. 2, cl. 2.

243. UCMJ art. 71(c)(1); R.C.M. 1209(a)(1)(c).

244. R.C.M. 1204(c)(2).

245. *Id.*

246. UCMJ art. 71(a).

247. UCMJ art. 71(a); R.C.M. 1207.

248. R.C.M. 1113(d)(1)(A).

249. Army Times, July 4, 1988, at 12, col. 2.

250. Army Times, July 4, 1988, at 12, col. 2, 16 col. 1; English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F.L. Rev. 552, 553 (1979).

251. Army Reg. 190-55, U.S. Army Correctional System: Procedures for Military Executions, para. 6-1 (27 October 1986).

252. Capital offenses under the UCMJ include: UCMJ art. 94 (Mutiny or sedition), art. 99 (Misbehavior before the enemy), art. 100 (Subordinate compelling surrender), art. 101 (Improper use of countersign), art. 102 (Forcing a safeguard), art. 104 (Aiding the enemy), art. 106(a) (Espionage), art. 110 (Improper hazarding of vessel), art. 113 (Misbehavior of sentinel), art. 118 (Murder), and art. 120 (Rape and carnal knowledge).

253. *See generally* R.C.M. 1004.

254. R.C.M. 1004(b)(1); *see also* R.C.M. 1004(c) for a listing of the aggravating factors.

255. UCMJ art. 52(b)(1); R.C.M. 1006(a), (d)(4); *see also* R.C.M. 1004(d).

256. R.C.M. 1004(a)(2).

257. UCMJ art. 52(a)(2); R.C.M. 1004(a)(2).

258. R.C.M. 1004(b)(4)(A)-(B), (b)(7), (b)(8)(c).

259. R.C.M. 1004(b)(4)(C).

260. Gaydos, *supra* note 11, at 79.

261. R.C.M. 1004(b)(3).

262. R.C.M. 1004(b)(6).

263. R.C.M. 1004(b)(8).

264. *See generally* R.C.M. 1003, 1006.

265. R.C.M. 1004 analysis at A21-64.1 to A21-68.

266. R.C.M. 1004 analysis at A21-68.

267. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

268. UCMJ, art. 55.

269. *See* Solem v. Helm, 463 U.S. 277, 284-88 (1982); *see also* Case Comment, *The Requirement of Proportionality in Criminal Sentencing: "Solem v. Helm"*, 11 New England Journal on Criminal and Civil Confinement 238, 239-240 (1985)(authored by Craig Olsen).

270. Weems v. United States, 217 U.S. 349 (1910).

271. *Id.* at 364.

272. Solem v. Helm, 463 U.S. 277, 307 (Burger, C.J., dissenting); *see* Weems v. United States, 217 U.S. 349, 364 (1910).

273. Weems v. United States, 217 U.S. 349, 382 (1910).

274. *Id.* at 367.

275. *Id.* at 378.

276. Trop v. Dulles, 356 U.S. 86, 101 (1958).

277. Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam).

278. *Id.* at 239-40.

279. *Id.* at 240.

280. *Id.* at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring).

281. *Id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

282. *Id.*

283. *Id.* at 256-57 (Douglas, J., concurring).

284. *Id.* at 310 (Stewart, J., concurring).

285. *Id.* at 313 (White, J., concurring).

286. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

287. *Id.* at 179-80.

288. *Id.* at 180.

289. *Id.* at 196-98.

290. *Id.* at 158-62.

291. *Id.* at 162 n.4.

292. *Id.* at 164-66.

293. *Id.* at 165-66.

294. *Id.*

295. *Id.* at 163-64.

296. *Id.* at 166-68.

297. *Id.* at 207.

298. Gregg v. Georgia, 428 U.S. 153, 168 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

299. *Id.* at 173.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 179-82.

304. *Id.* at 183-87.

305. *Id.* at 187.

306. *Id.*

307. *Id.* at 188.

308. *Id.* at 206-07.

309. *Id.* at 198.

310. Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion).

311. *Id.* at 282-84 (opinion of Stewart, Powell, and Stevens, JJ.).

312. *Id.* at 286-87.

313. *Id.* at 284, 286.

314. *Id.* at 286.

315. *Id.* at 288-305.

316. *Id.* at 288-301.

317. *Id.* at 289-93.

318. *Id.* at 293, 295-96.

319. *Id.* at 289-95.

320. *Id.* at 301.

321. *Id.* at 302.

322. *Id.*

323. *Id.* at 302-03.

324. *Id.*

325. *Id.* at 303.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 304.

331. Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) (plurality opinion).

332. *Id.* at 327-28.

333. *Id.* at 332 (opinion of Stewart, Powell, and Stevens, JJ.).

334. *Id.* at 331-36.

335. *Id.*

336. *Id.* at 335-36.

337. *Id.* at 333.

338. Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) (per curiam).

339. *Id.* at 636.

340. *Id.* at 638.

341. *Id.* at 637.

342. *Id.* at 636-37.

343. *Id.* at 637.

344. Gregg v. Georgia, 428 U.S. 153, 187 n.35 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

345. Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion).

346. *Id.* at 586 (opinion of White, J.)

347. *Id.* at 592.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 593.

352. *Id.* at 595-96.

353. *Id.* at 597.

354. *Id.* at 598.

355. Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).

356. *Id.* at 593-594 (opinion of Burger, C.J.).

357. *Id.* at 608.

358. *Id.*

359. *Id.* at 604.

360. *Id.* at 605.

361. *Id.*

362. *Id.* at 608.

363. Eddings v. Oklahoma, 455 U.S. 104 (1982).

364. *Id.* at 105-06.

365. *Id.* at 107.

366. *Id.* at 109.

367. *Id.* at 113-14.

368. Enmund v. Florida, 458 U.S. 782, 787 (1982).

369. *Id.* at 784-89.

370. *Id.* at 783-86.

371. *Id.* at 798.

372. *Id.* at 788.

373. *Id.* at 788-801.

374. *Id.* at 792.

375. *Id.* at 794-95.

376. *Id.* at 797.

377. *Id.* at 798-801.

378. *Id.* at 797.

379. Tison v. Arizona, 481 U.S. 137 (1987).

380. *Id.* at 149-50.

381. *Id.* at 151-52.

382. *Id.*

383. *Id.* at 152.

384. *Id.* at 152-55.

385. *Id.* at 154.

386. *Id.* at 156-58.

387. *Id.* at 158.

388. Woodson v. United States, 428 U.S. 280, 287 n.7 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

389. Roberts (Harry) v. United States, 431 U.S. 633, 637 n.5 (1977) (per curiam).

390. Lockett v. Ohio, 438 U.S. 586, 604 n.11 (1978) (opinion of Burger, C.J.).

391. Sumner v. Shuman, 107 S.Ct. 2716 (1987).

392. *Id.* at 2718.

393. *Id.*

394. *Id.* at 2724.

395. *Id.*

396. *Id.* at 2718, 2724.

397. *Id.* at 2727.

398. *Id.* at 2723-27.

399. *Id.* at 2723.

400. *Id.* at 2724.

401. *Id.* at 2720 (quoting Gregg v. Georgia, 428 U.S. 153, 189 n.38 (1976) (emphasis added)).

402. *Id.* at 2722 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original)).

403. *Id.* at 2724-26.

404. *Id.* at 2727.

405. *Id.* at 2726.

406. *Id.* at 2727.

407. *Id.*

408. *Id.* at 2723-27.

409. *Id.*

410. United States v. Matthews, 16 M.J. 354 (C.M.A. 1983).

411. *Id.* at 368.

412. *Id.* at 369.

413. *Id.* at 377.

414. *See, e.g.*, 2 H. Wheaton, *supra* note 6, at 220; 2 L. Oppenheim, *supra* note 3, at 424.

415. J. Bluntschli, *supra* note 76, at 78.

416. *Id.*

417. 2 L. Oppenheim, *supra* note 3, at 424.

418. 2 H. Wheaton, *supra* note 6, at 220.

419. Lauterpacht, *The Problem of the Revision of the Law of War*, 28 Brit. Y.B. Int'l L. 360, 381 (1952).

420. J. Stone, Legal Controls of International Conflict 563 (1954).

421. T. Lawrence, The Principles of International Law 499-500 (7th ed. 1924).

422. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T.

3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. IV].

423. *Id.* art. 68, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 330.

424. *Id.*

425. M. Greenspan, The Modern Law of Land Warfare 328 (1959).

426. Geneva Convention No. IV, 6 U.S.T. 3516, 3660, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 432.

427. Of the sixty signatories to Geneva Convention No. IV, only six made a reservation to Article 68, paragraph 2. These six signatories were Argentina, New Zealand, the Netherlands, Great Britain, Canada, and the United States. *See* Geneva Convention No. IV, 6 U.S.T. 3516, 3622-29, 3647-93, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 392-401, 419-64.

428. *See supra* text accompanying notes 269-76, 298-306, 344-54 & 368-87.

429. *See supra* text accompanying notes 298-306, 344-54 & 368-87.

430. *See supra* text accompanying notes 269-76, 298-300 & 303.

431. *See supra* text accompanying notes 63-102 & 414-27.

432. *See supra* text accompanying notes 18-59.

433. *See supra* text accompanying notes 298-301, 304, 344-49 & 355.

434. *See supra* text accompanying notes 298-302, 305, 344-54 & 368-87.

435. *See supra* text accompanying notes 310-43 & 388-409.

436. *See supra* text accompanying notes 310-20 & 335.

437. *See supra* text accompanying notes 321-28, 336 & 407.

438. *See supra* text accompanying notes 329-30, 337, 341-43, 355-67 & 399-404.

439. *See supra* text accompanying notes 355-67.

440. *See supra* text accompanying note 405.

441. *See supra* text accompanying note 407.

442. *See supra* text accompanying note 266.

443. R.C.M. 1004 analysis at A21-68.

444. *See* R.C.M. 1004.

445. *See supra* text accompanying notes 204-06.

446. UCMJ art. 52(b)(1).

447. R.C.M. 1004 analysis at A21-68.

448. *Id.*

449. *See supra* text accompanying notes 391-409.

450. *See supra* text accompanying notes 398-407.

451. R.C.M. 1004 analysis at A21-68.

452. *See supra* text accompanying notes 39-46.

453. *See supra* text accompanying notes 40-42.

454. *See supra* text accompanying notes 414-421.

455. J. Root, *supra* note 3, at 74.

456. *Id.* at 75-76.

457. 131 Cong. Rec. S10,349 (daily ed. July 30, 1985).